TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1715~~. ~~443~~ ~~46~~ ~~439~~ 129

ELIZA COOPER, B. P. COOPER, AND FANNIE WESTROPE, PLAINTIFFS IN ERROR,

vs.

STEWART NEWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED APRIL 18, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1716.

ELIZA COOPER, B. P. COOPER, AND FANNIE WESTROPE, PLAINTIFFS IN ERROR,

vs.

STEWART NEWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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1-2 [Seal United States Circuit Court, Eastern District of Texas.]

In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

STEWART NEWELL
vs.
ELIZA COOPER, B. P. COOPER, and FANNIE WESTROPE. } No. 1586.

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular March term, 1891, of said court, to wit, on the 24th day of March, A. D. 1891, the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, presiding, the following proceedings were had and taken in said court, to wit:

4 *Stipulation of Counsel as to Record on Writ of Error. Filed March 28th*, 1891.

STEWART NEWELL
vs.
ELIZA COOPER *et als.* } 1586. Stipulation of Counsel.

It is hereby stipulated that the following papers shall comprise the record to be made up in this case by the clerk for transmission to the Supreme — upon defendants' writ of error:

1. Plaintiff's original petition, filed July 5, 1890.
2. Replication to defendants' first amended original answer, filed December 4, 1890.
3. Defendants' second supplemental answer, filed March 9, 1891.
4. Defendants' second amended original answer, filed March 9, 1891.
5. The verdict and judgment.
6. Motion for new trial.
7. Judgment on motion for new trial.
8. Defendants' bills of exceptions.
9. Plaintiff's bills of exceptions.
10. Defendants' petition for writ of error and assignment of errors.
11. Plaintiff's assignment of errors.
12. The writ of error, the writ of error bond, and the citation in error.

5 The clerk will please confine himself to the above papers in preparing transcript.

O. T. HOLT AND HUME & KLEBERG,
Attorneys for Defendants and Plaintiffs in Error.
JOHN IRELAND,
Attorney for Plaintiff and Defendant in Error.

The foregoing stipulation is indorsed as follows:

C. L. 1586. Stewart Newell *v.* Eliza Cooper *et al.* Stipulation of counsel as to record on writ of error. Filed March 28, 1891. C. Dart, clerk.

6 *Plaintiff's Original Petition. Filed July 5, 1890.*

THE STATE OF TEXAS, }
County of Galveston. }

In the Circuit Court of the United States for the District of the State of Texas, Sitting in the City of Galveston.

To the hon. the circuit court of the United States, sitting at Galveston:

The petition of Stewart Newell, a resident citizen of the city of New York, in the State of New York, hereinafter styled plaintiff, complaining of Eliza Cooper, B. P. Cooper, and Fannie Westrope, all residents of Galveston county, in the State of Texas, and hereinafter styled defendants.

That on the first day of June, A. D. 1890, plaintiff was lawfully seized and possessed of the tract of land hereinafter described, situated in the county of Harris, in the State of Texas, holding the same in fee simple.

That on the day and year last aforesaid defendants entered upon said premises and ejected plaintiff therefrom and unlawfully withholds from plaintiff the possession thereof, to his damage five hundred dollars.

7 That the premises so entered upon and unlawfully withheld by defendants from plaintiff are bounded and described as follows, to wit, the same being a part of the Luke Moore league, and the part thereof in controversy in this suit is described, to wit: Beginning at a gum S. 70° E. 500 varas from N. W. corner of Luke Moore league for northwest corner and which is the N. E. corner of lot No. 1, thence S. 20° W. 2,000 v's to a pine 24 feet dia. for the S. W. corner and which is the S. E. corner of lot No. 3; thence S. 70° E. 500 varas to a post oak 3 inches in dia. for S. E. corner; thence north 20° E. 2,000 varas to a gum 4 inches in dia. on the northeast boundary line of Luke Moore league; thence north 70° west 500 varas with said Moore's northeast boundary line to the place of beginning, containing 177 acres of land, comprising lots two and four.

That the foregoing-described premises are of the value of fifty thousand dollars.

Wherefore plaintiff prays for citation requiring each of said defendants to answer hereto, and upon a final hearing for a judgment against said defendants for said premises, a decree and writ of possession therefor, and for costs of suit and for general and special relief; and in duty bound will ever pray.

LANE, MAYFIELD & JOHN IRELAND,
Att'ys for Plaintiff.

8 The foregoing petition is indorsed as follows:

C. L. No. 1586 Stewart Newell *v.* Eliza Cooper, B. P. Cooper, and Fannie Westrope. Original petition. Filed July 5, 1890. C. Dart, clerk. This action is brought as well to try title as for damages. Lane, Mayfield & Ireland, att'ys for pl'ff.

STEWART NEWELL
v.
ELIZA COOPER *et al.* } C. L. 1586.

GALVESTON, *March 24th*, 1891.

We, the jury, find for the plaintiff the land as described in the petition.

J. V. WHITE, *Foreman.*

9 *Plaintiff's Replication to Defendants' First Amended Original Answer. Filed Dec'r 4th*, 1890.

STEWART NEWELL
vs.
ELIZA COOPER, B. P. COOPER, and FANNIE WESTROPE. } No. 1580. Suit Pending in U. S. Circuit Court for the Eastern District of Texas, Sitting at Galveston.

Comes plaintiff, Stewart Newell, and, replying to the allegations in defendants' 1st amended original answer, filed herein on this day, says, 1st:

He denies each and every allegation in said 1st amended original answer contained and asks that strict proof thereof be required.

2nd. He says that if any judgment was rendered in Brazoria county on or about May 20th, 1850, in favor of Peter McGreal against plaintiff in a suit styled Peter McGral *vs.* Stewart Newell, No. 1527, for the land described in pl'ff's petition (all of which pl'ff denies) that the same is null and void and not binding on this pl'ff, for the following reasons, to wit:

First. That at the time of the rendition of said judgment, May 20, 1850, pl'ff was not a resident of Brazoria county, Texas, nor of the State of Texas, nor was he then within said Brazoria county or the State of Texas.

10 That at no time did he ever reside in Brazoria county, Texas; that on the — day of ——, 1848, pl'ff *p'ff* removed from Galveston, Texas, to the city of Philadelphia, in the State of Pennsylvania, and resided in said city of Philadelphia continuously from said date until in the year 1854, when he removed from said Philadelphia to the city of New York, in the State of New York, where he has continuously resided since said date to the present time, and during the time of his residence in the city of Philadelphia he was a resident citizen of the State of Pennsylvania, and during his residence in the city of New York he was and is a resident citizen of the State of New York, and during said time has never been a citizen of the State of Texas nor resided therein nor been within said State since the year 1848, but at all times since said time has resided and been without the limits of said State in the said cities of Philadelphia, in the State of Pennsylvania, and in New York, in the State of New York. Pl'ff further says he was never served with citation, process, or otherwise notified of the existence or pendency of said suit, nor was he a party to said suit with his knowledge, consent, or approval, nor did he submit himself to

the jurisdiction of said court, nor did he employ or authorize any one for him to employ any one to represent him or enter an appearance in said suit, nor did he know of the pendency or existence of said suit in any manner whatever until in the year A. D. 1875, more than 15 years after the filing of said suit and the alleged rendition of judgment therein.

11 Pl'ff further says that if any attorney appeared for him in said suit he did so without authority, permission, knowledge, or consent of pl'ff, and that such appearance was entered through collusion with said att'y and *pl'ff* in said cause to injure and defraud pl'ff herein.

For all of these reasons and for the further reasons apparent on said judgment the same is null and void and has no binding force or effect against pl'ff herein.

JNO. IRELAND,
LANE & MAYFIELD,
Att'ys for P'ff.

Indorsements: Stewart Newell *v.* Eliza Cooper *et al.* No. 1586. Pl'ff's replication to def'ts' 1st am'n'd & original answer. Filed Dec'r 4, 1890. C. Dart, clerk.

12 *Defendants' Second Supplemental Answer. Filed March 9, 1891.*

United States Circuit Court, Galveston, Texas.

STEWART NEWELL
vs.
ELIZA COOPER *et als.* } No. 1586.

1. And now come the said defendants and, with leave of court, file this their second supplemental answer in lieu of their first supplemental answer, filed herein December 4th, 1890, and say that plaintiff's first supplemental petition or replication, filed herein December 4th, 1890, is insufficient in law, and of this they pray judgment of the court.

2. And, specially excepting to said first supplemental petition or replication, they say that the same is insufficient in law, because—

First. It appears therefrom that plaintiff thereby attacks collaterally and alleges to be void the judgment of the district court of Brazoria county, in the State of Texas, and within the said eastern district thereof, a court of general jurisdiction of the parties and the subject-matter connected with and involved in said judgment.

Second. It appears therefrom that said judgment is a domestic judgment, assailable only in a direct proceeding to im-

13 peach it.

Third. It appears therefrom that said judgment is a domestic judgment, assailable only by a direct proceeding to impeach it in the court where rendered or by writ of error to that court.

Fourth. It appears therefrom that the plaintiff has had full knowledge of said suit and judgment since the year 1875, and it does not appear that he has ever taken any proceeding to review,

appeal from, vacate, or qualify said judgment, and his right to do so now is barred by limitation and lost by laches.

Fifth. It appears therefrom that plaintiff does not claim to have or to have had at any time a meritorious defense to the said suit in which said judgment was rendered.

And of the said special exceptions and each of them they pray judgment of the court.

O. T. HOLT,
HUME & KLEBERG,
Counsel for Defendants.

And in the event only of said exceptions being overruled the said defendants deny all and every the matters alleged in said first supplemental petition or replication as reasons for the alleged nullity of said judgment.

O. T. HOLT,
HUME & KLEBERG,
Counsel for Defendants.

14 Indorsements: No. 1586. U. S. C. C. March term. Stewart Newell *v.* Eliza Cooper *et als.*, d'f'ts. Second supplemental answer. Filed March 9, 1891. C. Dart, clerk, by W. L. Hanscom, dept. O. T. Holt, Hume & Kleberg, for defendants.

15 *Defendants' Second Amended Original Answer. Filed March 9, 1891.*

United States Circuit Court, Galveston, Texas.

STEWART NEWELL
v.
ELIZA COOPER *et als.* } No. 1586.

1. Now come the said defendants and, with leave of court, file this their second amended original answer in lieu of their first amended original answer, filed December 4th, 1890, and say that the said petition of plaintiff is insufficient in law, and of this they pray judgment of the court.

2. And for plea in this behalf come the said defendants and defend the force and injury, when, etc., and deny all and singular the allegations in said petition contained, and say that they are not guilty of the said supposed wrongs, injuries, and trespasses in said petition charged or any or either of them in manner and form as the said plaintiff has thereof in said petition complained against them, and of this they put themselves upon the country.

Wherefore, etc., etc.

3. And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they have had and held peaceable, continuous, uninterrupted, and exclusive adverse
16 possession under title from and under the State of Texas of the said lands and tenements claimed in plaintiff's petition

for more than three years next before the commencement of this suit, and this they are ready to verify.

Wherefore, etc., etc.

4. And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they have had and held peaceable, continuous, uninterrupted, and exclusive adverse possession under color of title from and under the State of Texas of the lands and tenements claimed in said plaintiff's petition for more than three years next before the commencement of this suit, and this they are ready to verify.

Wherefore, etc., etc.

5. And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they and those whose estate they have, claiming the same under deeds duly registered, have had peaceable, continuous, uninterrupted, and exclusive adverse possession of the lands and tenements claimed in said plaintiff's petition, cultivating, using, and enjoying the same and paying all taxes due thereon for a period of more than five years next before the commencement of this suit, and this they are ready to verify.

Wherefore, etc., etc.

17 6. And for further plea in this behalf the said defendants say that the ~~said~~ plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they, claiming to have good and perfect right and title thereto, have had peaceable, continuous, exclusive, and adverse possession of the lands and tenements claimed in said plaintiff's petition, cultivating, using, and enjoying the same for a period of more than ten years next before the commencement of this suit, and this they are ready to verify.

Wherefore, etc., etc.

7. And for further plea in this behalf the said defendants say that the said plaintiff ought not to have and maintain his aforesaid action thereof against them, because they say that they, claiming to be the true and lawful owners thereof, have had and held peaceable, continuous, exclusive, and adverse possession of the lands, tenements, and premises claimed in said plaintiff's petition for more than ten years next before the commencement of this suit, and that the said plaintiff for the said term of ten years hath not made entry thereon. Wherefore, by reason of said plaintiff's non-entry on said lands and premises as aforesaid, he is forever barred of his right of recovery against these defendants, and this they are ready to verify.

Wherefore, etc., etc.

O. T. HOLT AND
HUME & KLEBERG,
Counsel for Defendants.

18 Indorsements: No. 1586. U. S. C. court. March term. Stewart Newell *v.* Eliza Cooper *et als.* Defendants' second

amended original answer. Filed March 9, 1891. C. Dart, clerk, by W. L. Hanscom, dept. O. T. Holt & Hume & Kleberg, for def'ts.

19 *Verdict and Judgment. Entered and Filed March* 24, 1891.

(From the Minutes.)

United States Circuit Court, Eastern District of Texas, at Galveston.

STEWART NEWELL
vs.
ELIZA COOPEE, B. P. COOPER, and FANNIE WESTROPE. } No. 1586, C. L.

MARCH 24TH, 1891.

On this day came the parties to this suit, by their attorneys, and, both parties announcing ready, thereupon came on to be heard the demurrer of the defendants to plaintiff's replication filed on the 4th day of Dec'r, 1890, which, being considered, is sustained in so far as the same is a collateral attack on the judgment complained of. Thereupon, the issues being joined, came a jury of good and lawful men, to wit, J. V. White and eleven others, who being duly elected, tried, impaneled and sworn, and accepted by the parties as a good and lawful jury to try the issues between them in this suit, thereupon the trial of the case proceeded and the trial concluded.

And the jurors aforesaid, having heard the pleadings and the evidence and argument, and having received the charge of the court, retired to consider of their verdict; and, after due deliberation, the jurors aforesaid returned into court and returned in open court their verdict, as follows:

20 "STEWART NEWELL
vs.
ELIZA COOPER *et al.* } C. L. 1586.

GALVESTON, *March 24th*, 1891.

We, the jury, find for the plaintiff the land as described in the petition.

J. V. WHITE, *Foreman.*"

Wherefore it is considered by the court and so ordered, adjudged, and decreed that the plaintiff herein, Stewart Newell, do have and recover from the defendants herein, Eliza Cooper, B. P. Cooper, and Fannie Westrope, the title and possession of the land and premises described in the plaintiff's petition, to wit: The tract of land situated in the county of Harris, in the State of Texas, being a part of the Luke Moore league, described as follows: Beginning at a gum S. 70° E. 500 varas from N. W. corner of Luke Moore league for northwest corner, and which is the N. E. corner of lot No. 1, thence S. 20° W. 2,000 v's to a pine 2½ feet dia. for the S. W. corner, and which is the S. E. corner of lot No. 3; thence S. 70° E. 500 varas to a post oak 3 inch- in dia. for S. E. corner; thence north 20° E. 2,000 varas to a stake, gum, 4 inch- in dia. on the northeast boundary

line of Luke Moore league; thence north 70° west 500 varas with said Moore's northeast boundary line to the place of beginning, containing 177 acres of land, comprising lots two and four, together with all and singular the rights, improvements, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining, and that he have his writ of possession therefor.

21 It is further considered by the court that the plaintiff recover of the defendants all costs about this suit incurred and have execution therefor.

It is further ordered that execution may issue against each party for the costs by them respectively incurred and due the officers of this court and unpaid.

22 *Defendants' Motion for New Trial. Filed March* 26, 1891.

U. S. Circuit Court, at Galveston.

STEWART NEWELL
v.
ELIZA COOPER *et als.* } No. 1586.

And now come the said defendants and move the court to set aside the judgment rendered in said cause and grant them a new trial thereof, because they say:

1. That the court erred in overruling the objection of defendants to the introduction in evidence by the plaintiff of the deed of Peter MacGreal to Stewart Newell, said objection being that the description therein of said 177 acres of land is insufficient to identify the land sued for and to authorize a decree therefor.

2. That the court erred in overruling the objection of defendants to the introduction in evidence by the plaintiff of the deed of D. Russell, sheriff of Harris county, to Peter MacGreal, said objection being that neither the allegations of the petitioner nor the reference in the said deed of Peter MacGreal to Stewart Newell to a deed made to said MacGreal by David Russell authorize the introduction of the deed so offered, in that the description in said petition is other than and different from the description in said deed offered, and the deed referred to in said deed of Peter MacGreal to Stewart Newell

23 is a deed from David Russell, whereas the deed offered in evidence is a deed from D. Russell, sheriff of Harris county, to Peter MacGreal.

3. That the court erred in sustaining plaintiff's objection to the introduction in evidence by defendants of the certified copy of the proceedings and judgment of the district court of Brazoria county in suit No. 1527, Peter MacGreal *vs.* Stewart Newell, and of the deed of D. Russell, sheriff of Harris county, to Peter MacGreal (theretofore put in evidence by plaintiff), offered by defendants in connection herewith, it being admitted by the parties, plaintiff and defendants, that no other deed from D. Russell, sheriff, to Peter MacGreal appeared of record in said Harris county, said objection being that said judgment was void for insufficiency of description of the 177 acres sued for by plaintiff in this action, in that said judgment only

described said land as one of "the several tracts of land in plaintiff's petition mentioned and described," and said petition only described said land as "a certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of Houston, about one mile from the capital, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner," and that said deed of D. Russell, sheriff, to Peter MacGreal was inadmissible and incompetent to show and identify the 177 acres referred to in said
24 petition and judgment, because the judgment was void, in that it did not describe the land, and the petition to which it referred did not describe it.

4. That the court erred in refusing to give the charge requested by defendants.

5. That the court erred in charging the jury to find for the plaintiff the land described in his petition and in overruling and disallowing defendants' exceptions to said charge, in that there was no evidence before the jury of title in plaintiff to the land mentioned in plaintiff's petition.

6. That the verdict of the jury is without evidence.

7. That the judgment of the court is unsupported by the evidence.

8. That the judgment of the court is contrary to the law.

9. That upon the whole record the judgment should be for the defendants.

O. T. HOLT AND HUME & KLEBERG,
Counsel for Defendants.

25 Indorsements: No. 1586. U. S. C. C., at Galveston. Stewart Newell *v.* Eliza Cooper *et als.* Defendants' motion for new trial. Filed March 26, '91. C. Dart, clerk. O. T. Holt and Hume & Kleberg, for motion.

Order Overruling Motion for New Trial.

United States Circuit Court, Eastern District of Texas, at Galveston.

From Minutes of said Court. March Term, March 28th, 1891.

STEWART NEWELL } C. L. No. 1586.
vs.
ELIZA COOPER *et al.* }

On this day again came the parties to this suit, by their attorneys, and thereupon came on to be heard the motion of the defendants for a new trial in this case.

And the said motion having been heard and argued, and the court being sufficiently advised, it is ordered that the said motion be overruled.

26 *Defendants' Bill of Exceptions. Filed March* 28, 1891.

In United States Circuit Court, Eastern District of Texas, at Galveston.

STEWART NEWELL
vs.
ELIZA COOPER *et al.* } No. 1586.

Bill of exceptions.

Be it remembered that on the trial of this cause, after the court made its orders sustaining the motions of defendant to suppress the depositions of the plaintiff, Stewart Newell, and sustaining the demurrers of defendant to the replication of plaintiff, the pleadings were read to the court and jury. It was admitted by the parties, plaintiff and defendants, that Peter MacGreal was the common source of title, and it was proved that the land sued for is of the value of $10,000.00.

Plaintiff then offered in evidence the deed of Peter MacGreal to plaintiff, Stewart Newell, dated Aug. 9, 1848, claiming and proposing to show thereby that he was by said deed vested with title to that tract of land therein described as "177 acres of land in the town tract of Houston, in Harris county, about one mile from the capital, and being the same tract conveyed to me by deed from David Russell, duly recorded in said county of Harris, which said
27 deed is referred to and made a part hereof," said deed of Peter MacGreal to Stewart Newell, plaintiff, being in words and figures following, to wit:

THE STATE OF TEXAS, }
County of Galveston. }

Know all men by these presents that I, Peter MacGreal, of the county of Brazoria, for and in consideration of the sum of $7,753.00 received by me in full payment on the 10th day of July, A. D. 1848, the receipt whereof I do hereby acknowledge, have granted, bargained, sold, and conveyed, and by these presents *doth* grant, bargain, sell, and convey, unto Stewart Newell, of the State and county aforesaid, the following tracts or parcels of land, to wit: 600 acres of land in Brazonia county lying on the west side of the San Bernard river about 8 miles from the town of Brazoria, being a part of the head-right of James Delany and adjoining the lands of T. Bell, T. and W. Alley, N. Dillard, and Hallsbury, all of which will more fully appear by reference to the patent from the State of Texas, issued on the first day of September, A. D. 1847, No. 354, vol. No. 4, which is made a part of this deed, the said 600 acres to be selected out of the said head-right in any way the said Newell or his heirs or assigns may deem proper; also one-half league of land east of the river Brazos and north of the Navasota, in the county of Brazos, being half of league No. 23, granted by the Mexican Government to William Hig-

gins on the 3rd day of December, A. D. 1832, and the same
28 conveyed by said Higgins on the 7th day of December, 1839, to Patrick MacGreal and by said Patrick sold and conveyed to John Adriance on the 2nd of February, A. D. 1841, and the same sold and conveyed by said Adriance to me on the 5th day of January, A. D. 1847, all of which will more fully appear by reference to the respective deeds of the said Higgins, MacGreal, and Adriance and a certified copy of the original grant to said Higgins, which are made parts of this deed.

Also one-half of the league of land granted by the State of Texas to John D. Ragsdale, lying in the district of Colorado, on the river Navidad, and the same conveyed to me by the said Ragsdale, and deed for which was recorded in the county of Colorado on the 15th day of February, A. D. 1847, and as shown by the patent for said land issued on the 4th day of March, 1847, No. 319, vol. No. 5, all of which will more fully and at large appear by reference to the said deed and patent, which are made a part of this deed; also 177 acres of land in the town tract of Houston, in Harris county, about one mile from the capitol and being the same tract conveyed to me by deed from David Russell, duly recorded in said county of Harris, which said deed is referred to and made a part hereof; also 640 acres of land lying in the district of Bexar, known as survey No. 511, in sec. No. 6, on the waters of the Atascosa creek, about 20 miles southwest from the city of Antonio, and granted to me as assignee of George E. Quinan by patent dated the 2nd day of
29 July, A. D. 1874, in vol. 2, which is referred to for a full description thereof, and which is also made a part of this deed; also 320 acres of land in Bexar district, known as survey No. 135, sec. No. 5, on the waters of Cottonwood creek, a branch of the Medina river, about 15 miles southwest from the city of San Antonio, and the same tract granted to me as assignee of John W. Ward by patent dated April 26th, 1847, No. 334, in vol. 4, which is referred to for a more full and particular description of said lands, and is also made a part of this deed; also 320 acres of land lying in the district of Bexar, known as survey No. 132, in sec. No. 5, on the Cottonwood creek, a branch of the Medina river, about 15 miles southwest of the city of San Antonio, and the same tract granted to me as the assignee of Thomas McGreal by patent dated April 23rd, A. D. 1847, No. 137, in vol. 2, which is referred to for a more full and particular description of said land, and is also made a part of this deed, together with all and singular the improvements, hereditaments, and privileges to the said tract of land belonging or in anywise incident or appertaining to the same.

To have and to hold the aforesaid tracts or parcels of land unto the said Stewart Newall and his heirs and assigns forever, free from claims or demands of all persons lawfully claiming or pretending to claim the same or any part thereof.

And I covenant and agree to warrant and forever defend the title to said tracts of land unto the said Newall and his heirs and
30 assigns, and that said lands are not in any way encumbered by any judgment, lien, mortgage, or deed of trust, and were

not on the 10th day of July, A. D. 1848; and I also agree at any time, at the request of the said Newall, his heirs or assigns, to make any other and further deed or deeds that his or their counsel learned in the law may deem requisite or necessary for the more full, absolute, and complete conveyance in fee simple of the aforementioned tracts or parcels of land, at the proper costs and charge to him or them.

In witness whereof I hereunto sign my name and affix my seal (a scroll by way of a seal) this 9th day of August, A. D. 1848.

PETER MacGREAL. [SEAL.]

STATE OF TEXAS, *County of Galveston:*

This is to certify that before me, James P. Nash, a notary public in and for the county of Galveston, being duly commissioned and authorized to practice, personally came and appeared Peter MacGreal, of Brazoria, in the State aforesaid, known to me, who acknowledged he had signed, sealed, and delivered the above and foregoing instrument, written on three full pages and on a part of the fourth, the same being joined together with a ribbon and the tie sealed with my official seal, for the purpose therein set forth.

Given under my hand, at Galveston, with the impress of my notarial seal, this the 11th day of August, A. D. 1848.

JAMES P. NASH,
N. P., C. G.

Recorded August 31st, 1848, at nine o'clock a. m.

W. R. BAKER, *C., H. C.*

THE STATE OF TEXAS, *County of Harris:*

I, C. F. Winkler, clerk of the county court in and for the
31 county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the deed from Peter MacGreal to Stewart Newall, as the same appears of record in the records of deeds of Harris Co., in vol. N, pages 39 & 40.

Witness C. F. Winkler, clerk of said court, and the seal thereof, at office, in the city of Houston, December 2nd, 1890.

C. F. WINKLER,
Clerk County Court, Harris County, Texas.
By C. B. FITZE, [SEAL.]
Dept. Clerk.

To the reading and introduction of this deed in evidence the defendants objected upon the ground that said description therein of said 177 acres is insufficient to identify the land sued for and to authorize a decree therefor; but the court overruled the objection so made by defendants and allowed said deed to be read, and it was accordingly read and put in evidence by plaintiff. To the judgment of the court overruling their said objection and admitting said deed in evidence defendants excepted at the time and reserved the benefit of their exception.

Plaintiff then offered in evidence the deed of D. Russell, sheriff of Harris county, dated 22nd June, 1847, to Peter MacGreal, claim-

ing and proposing thereby to show the description of the 177 acres sued for by him and referred to in said deed of Peter MacGreal to him, said Stewart Newell, dated August 9, 1848, and hereinbefore shown, said deed so offered being in the words and figures following, to wit:

STATE OF TEXAS, }
County of Harris. }

32 Know all men by these presents that whereas, at the spring term of the district court, held at the city of Houston on the 7th day of May, 1840, in and for the county of Harris, then the Republic of Texas, now the State aforesaid, Timothy Pillsbury, assignee, *et al.*, by the judgment of said court, recovered against George W. Grant the sum of $348\frac{47}{100}$ debts, besides interests and costs, amounting in all to the sum of $402\frac{14}{100}$; and whereas the said court did render and enter up a decree of foreclosure condemning lots Nos. 2 and 4, each lot containing 88 acres and one-half, described in the mortgage given to secure the payment of said debts recovered, in Book A, page 470; upon which said judgment a copy of said decree and writ of *fieri facias* issued from the clerk's office of the district court aforesaid, bearing date the 24th day of July, 1846, and directed to the sheriff of Harris county, commanding him to proceed to sell the said lots Nos. 2 and 4 according to law, sufficient to satisfy the debt, damages, interest, and costs aforesaid, which was duly levied on the 5th day of September, 1846, upon lots Nos. 2 and 4 aforesaid by the sheriff of said county, which were not sold for want of time, and a return of the levy was duly made on said *fi. fa.*; and whereas on the 15th day of December, 1846, a *venditioni exponas* issued from the clerk's office of the said district clerk, directed to the sheriff of Harris county, commanding him again to proceed to sell the lots 2 and 4 aforesaid according to law, sufficient to make the debt, damages, interest, and costs due thereon, etc.; that in accordance with the said writ I, the said sheriff, after having given due notice of the same in term of the law, did, on Tuesday, the 5th day of January, 1847, at the court-house of said county, as
33 stated in the notice duly given, proceed to sell to the highest bidder according to law, having previously had said property duly appraised under oath by the following citizens, A. Wynns and I. W. Brashear, agreeably to the acts to reduce into one and amend the several acts concerning executions, approved January 27th, 1842, who appraised the above and following described lands and the same at $2.00 per acre; whereupon Peter MacGreal, by T. B. J. Hadley, Esq., his attorney, bid the sum of $1.33\frac{1}{3}$ per acre, being $\frac{2}{3}$ of the appraisement, amounting to the sum of $236.13, for said lots 2 and 4, situated in the State and county aforesaid, between the waters of Buffalo and Brays bayous and about $1\frac{1}{4}$ mile from the city of Houston and about $3\frac{1}{2}$ miles from the town of Harrisburg, and being the northwest part of a league of land originally granted to Luke Moore, now generally known and designated as lots Nos. 2 and 4 in the western division of said league of land, beginning at a stake, from which a red oak, marked blazed and two chops, bears

east 500 v's south 70 E. from the northwest corner of the said Moore T., R., or league, being also the northeast corner of lot No. 1, thence south 20 west with the east boundary line of lots 1 and 3, at 640 v's to prairie, at 1,048 v's cross Houston and Virginia Point road, at 1,398 v's to timber, at 2,000 v's in all to a stake, from which a red oak marked M bears S. 37 W., distant 9 ft., and a post oak marked X bears south 79 west, distant 6 ft; thence south 70 east 500 v's, through a briar thicket, to a stake, a gum, four inc. in diameter marked M; thence N. 20 east, at 639 v's to a prairie
34 at a point of timber near the road, at 915 v's passed a three-pronged gum in the prairie, at 1,608 v's to timber, at 2,000 v's in all to a gum 6 inc. in diameter on the north boundary line of said Moore league, marked X; thence north 70 west 500 v's with said line to the place of beginning, it being the same land specified in the said decree mortgage return on the *fi. fa.* aforesaid and advertisement, as ascertained by a recent survey of the same by George Brinhurst, county surveyor, which being more than was offered by any one else, the said property was sold to him, said Peter MacGreal:

Now, therefore, I, David Russell, sheriff of the county aforesaid, acting in my official capacity and by virtue of the powers in me by law vested and the judgment and decree as aforesaid, and the writ of *venditioni exponas* to me directed, and the sum of $236\frac{13}{100}$ to me in hand paid, the receipt of which is hereby acknowledged and confessed and acquittance therefor given, have this day granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said Peter MacGreal, his heirs and assigns, the above-described property, together with all the rights, members, and appurtenances thereunto belonging; to have and to hold the same to himself, his heirs and assigns forever, in as full, good, and perfect manner as the said George W. Grant had at or before the rendition of the above-cited judgment, when said premises became
liable to satisfy the same, with damages, costs of court, etc.
35 In testimony whereof I have hereunto set my hand and scroll by way of seal in my official capacity this 22nd day of June, A. D. 1847.

D. RUSSELL,
Sh'ff, H. C. [SEAL.]

THE STATE OF TEXAS, }
Harris County. }

Before me, William R. Baker, clerk in and for said county, acting by John Allen Southmayd, dep't, this day came and personally appeared David Russell, to me well known as sheriff of Harris county, who declared that on the day of the date thereof, for the purposes set forth therein and in his official capacity as sheriff aforesaid, he executed the foregoing deed.

Witness my hand and the impress of the seal of Harris county, at office, in Houston, August 7th, 1847.

W. R. BAKER, *Clerk,*
By J. A. SOUTHMAYD, *Dep't.* [SEAL.]

Recorded August 7th, 1847, at 9 o'clock a. m.

W. R. BAKER, *C., H. C.*

THE STATE OF TEXAS, }
County of Harris. }

I, C. F. Winkler, clerk of the county court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the deed of George W. Grant, by sheriff, to Peter MacGreal as found in the records of deeds in said county, vol. M, pages 156 and 158, as the same appears of record in my office.

Witness C. F. Winkler, clerk of said court and the seal thereof, at office, in the city of Houston, December 2d, 1890.

C. F. WINKLER,
County Clerk,
[SEAL.] By D. B. FITZE, *Deputy.*

36 To the reading and introduction of this deed in evidence the defendants objected, upon the ground that neither the allegations of the petition nor the reference in the said deed of Peter MacCreal to Stewart Newell to a deed made to said MacGreal by David Russell authorized the introduction of the deed so offered, in that the description in said petition is other than and different from the description in said deed offered, and the deed referred to in said deed of Peter MacGreal to Stewart Newell is a deed from David Russell, whereas the deed offered in evidence is a deed from D. Russell, sheriff of Harris county, to Peter MacGreal.

But the court overruled the objection so made by the defendants and allowed said deed to be read, and it was accordingly read and put in evidence by plaintiff.

To the judgment of the court overruling their said objection and admitting said deed in evidence defendants excepted at the time and reserved the benefit of their exception.

The foregoing was all the evidence introduced by plaintiff, and he here rested his case.

The defendants then introduced and resd in evidence the deed of Peter MacGreal to Thomas E. Westrope, dated 2nd March, 1860, in words and figures following, to wit:

STATE OF TEXAS, }
Galveston County. }

Know all men by these presents that I, Peter MacGreal, of the county of Brazoria, State of Texas, for and in consideration
37 of the sum of six hundred and fifty dollars cash to me in hand paid by Mr. Thomas E. Westrope, of the county of Harris, the receipt of which is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to the said Westrope and his heirs and assigns forever lots Nos. 2 and 4, containing in each 88½ acres, near the town of Houston, being parts of the Luke Moore grant and being the same tracts bought by me at sheriff's sale in the case of Perry,

executor of Austin, *vs.* Grant, together with all the rights, privileges, and appurtenances to the same belonging and appertaining:

To have and to hold the said tracts of land to the said Thomas E. Westrope and his heirs and assigns forever.

And I bind myself, my heirs, &c., to warrant and defend this title against the lawful claims or demands of all persons.

Given under my hand this 2nd March, A. D. 1860.

PETER MacGREAL.

In presence of—
H. B. ANDREWS.
JOHN H. STERRETT.

THE STATE OF TEXAS, }
Harris County. }

Before me, J. B. Dart, clerk of the county court of Harris county, this — came and appeared John H. Sterrett, of said county, to me known, who on oath said that Peter MacGreal in his presence acknowledged the execution of the foregoing deed, dated 2nd March, 1860, and delivered the same as his binding act and deed for
38 the purposes and considerations therein set forth and contained, and that he, affiant, signed the same as a witness at the request of the said Peter MacGreal.

Witness my hand and seal of Harris county court, at Houston, this 26th day of March, 1860.

[SEAL.] J. B. DART, *Clerk.*

Filed March 26, 1860, at 10 o'clock a. m., and recorded on Harris county record of deeds, Book W, pages 543 & 4.

Witness my hand and seal of Harris county court, at Houston, this 26th ——, 1860.

J. B. DART, *Clerk*,
[SEAL.] By C. DART, *Dp'y.*

Indorsements: C. L. 1586. Peter MacGreal. Deed to Thomas E. Westrope. Filed March 26th, 1860, at 10 o'clock a. m. J. B. Dart *Dart*, clerk, by C. Dart, dep'y. Filed December 1, 1890. C. Dart, clerk.

It was admitted by both plaintiff and defendants that by a decree of the county court of Galveston county, Texas, at its April term, 1864, the estate of said Thomas E. Westrope was partitioned among his heirs, and that in and by said decree the property named in the foregoing deed of Peter MacGreal to Thomas E. Westrope of 2nd March, 1860, was allotted and adjudged to the defendant herein Eliza Cooper, then Eliza Westrope, and to the defendant herein Fannie Westrope, they being heirs of said Thomas B. Westrope, and that said Eliza Cooper is now the wife of defendant B. P. Cooper.

Defendants then offered in evidence the certified copy of
39 the proceedings and judgment of the district court of Brazoria county, at its spring term, 1850, in the suit No. 1527, of

Peter MacGreal *v.* Stewart Newell, in words and figures following, to wit:

THE STATE OF TEXAS, }
County of Brazoria. }

To the Hon. Joseph C. Megginson, judge of the first judicial district in and for the State of Texas:

The petition of Peter MacGreal, a resident citizen of the county of Brazoria, complaining against Stewart Newell, who is also a resident citizen of said county of Brazoria, respectfully showeth unto your honor that on the first day of February, A. D. 1850, he owned in fee simple and was seized and possessed by good title of 600 acres of land in Brazoria county lying on the west side of the San Bernard river, about 8 miles from the town of Brazoria, being a part of the head-right of James Delany, adjoining the lands of T. Bell, T. and W. Alley, N. Dillard, and H. Alsbury, and more fully described in the patent No. 354, in vol. 4, dated the first of September, 1847, issued to your petitioner as the assignee of said James Delany; that on the — day of February, 1850, the said Stewart Newell, with force and arms, did enter upon and take possession of the said 600 acres of land, and that on the first day of February, A. D. 1850, your petitioner also owned in fee simple and was seized and possessed by a good title of one-half league of land lying east of the river Brazos and north of Navasota, in the county of Brazos, being half
40 of league No. 23, granted by the Mexican Government to Maria Kiggans on the 3rd day of December, A. D. 1832.

And that on the — day of February, 1850, in the county of Brazoria, the said Stewart Newell, with force and arms, did enter upon and take possession of the said half league of land. Your petitioner further represents that on the first day of February, A. D. 1850, he also owned in fee simple and was seized and possessed of good title of a certain other tract of land, being one-half of the league of land granted by the State of Texas to John D. Ragsdale, lying in the said district of Colorado, on the river Navidad, being one moiety of the land described in the patent No. 319, in vol. 5, issued on the 4th of March, 1847, to said Ragsdale, and that on the — day of February, 1850, the said Stewart Newell, *in the* force and arms, did enter upon and take possession of the said last-mentioned half league of land. He further represents that on the first day of February, A. D. 1850, he also owned in fee simple and was seized and possessed by good title of a certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of the town of Houston, about one mile from the capitol, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner; that on the — day of February, 1850, the said Stewart Newell, with force and arms, did enter upon and take possession of the said last-mentioned tract of land. He further represents that on the first day of February, A. D. 1850, he also owned in fee simple and was
41 seized and possessed by good title of 640 acres of land lying

in the district of Bexar, known as survey No. 511, in sec. No. 6, on the waters of the Atascosa creek, about 20 miles southwest from the city of San Antonio, granted by the State of Texas to your petitioner as the assignee of George E. Quinan by patent No. 157, in vol. No. 2, dated July 2nd, 1847.

And that on the first day of February, A. D. 1850, your petitioner also owned and was seized and possessed by good title of a certain other tract or parcel of land in Bexar district, containing 320 acres of land, known as survey No. 135, in sec. No. 5, on the waters of Cottonwood creek, a branch of the Medina river, about 15 miles southwest from the city of San Antonio, being the same tract granted by the State of Texas to your petitioner as the assignee of John N. Ward by patent No. 334, in vol. No. 4, on the 26th day of April, A. D. 1847.

And that on the first day of February, A. D. 1850, your petitioner also owned in fee simple and was seized and possessed by good title of a certain other tract or parcel of land in Bexar district, containing 320 acres of land, and known as survey No. 132, in sec. No. 5, on the Cottonwood creek, a branch of the Medina river, about 15 mi. southwest from the city of San Antonio, and being the same tract of land granted by the State of Texas to your petitioner as assignee of Peter MacGreal by patent No. 137, in vol. No. 2, dated the 23rd April, 1847; and your petitioner represents that on the — day of February, 1850, the said Stewart Newell, with force and arms,
42 wrongfully entered upon and took possession of the said three several and last-mentioned tracts of land in the said district of Bexar and now unjustly holds possession of the same. He represents that the said Stewart Newell now unjustly and illegally holds possession of all of the aforementioned tracts of land.

Wherefore your petitioner prays that the said Stewart Newell may be cited to be and appear before the next term of your honorable court for said county of Brazoria; that he be condemned to restore to your petitioner the peaceable possession of the said tracts of land and each of the said tracts or parcels of land aforementioned; that the said Stewart Newell and all other persons be thereafter restrained from disturbing him in the possession and use thereof; that the said defendant be condemned to pay to your petitioner $5,000.00 damages for the unlawfully taking possession of the said several tracts of land, and also reasonable rent for the same, and for all such other and further relief as in law and equity he may be entitled to for costs of suit, and that your petitioner be forever quieted in the title and in the possession of all of the aforesaid tracts of land.

JOHN B. JONES,
For Plaintiff, Stewart Newell.

The defendant will take notice that this action is brought as well to try the title of the lands hereinbefore described as having been forcible taken possession of as for damages.

JNO. B. JONES,
Plaintiff's Attorney.

43 In Hon. District Court. May Term, A. D. 1850.

PETER MACGREAL
vs.
STEWART NEWELL. } No. —.

And now comes the defendant, Stewart Newell, and says that the matters and things contained in plaintiff's petition are not sufficient in law for the plaintiff to have or maintian his aforesaid action against this defendant; wherefore he prays judgment.

J. A. SWEET,
Attorney for Defendant.

And now, at this term of your hon. court, comes the said defendant, Stewart Newell, and defends, &c., and says that he denies all and singular the allegations in said plaintiff's petition contained.

J. A. SWETT,
Attorney for Defendant.

And for further answer in this behalf the said defendant says he is not guilty in manner and form as the said plaintiff in his said petition doth complain against him, and of this he puts himself before the country.

J. A. SWETT,
Attorney for Defendant, Stewart Newell.

PETER MACGREAL
vs.
STEWART NEWELL. } 1527.

In this case, both parties being present, by their respective attorneys, the demurrer of defendant to plaintiff's petition came on and, being heard by the court, was overruled.

We, the jury, find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition.

E. GEISECKE, *Foreman.*

May 21st, 1850.

PETER MACGREAL
vs.
STEWART NEWELL.

44 This day came the parties, by their attorneys, and the demurrer of the defendant being heard the same was overruled; and thereupon came the following jury of good and lawful men, to wit, J. J. Harrell, John Brown, Stephen F. Perry, Martin M. Sauters, Owen Clinton, Henry Ahrens, Rob't Cowen, Edward Pullman, Harvey Franklin, Jordan Taylor, George Eissel, and Edward Geisecke, who, after hearing the evidence and argument, thereupon returned the following verdict:

"We, the jury, find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition.

E. GEISECKE, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court that the plaintiff do have and recover of and from the defendant the several tracts of land in plaintiff's petition mentioned and described and all thereof; that the said Stewart Newell be forever barred from having or asserting any claim, right, or title to all or any portion of the said tracts of land or any part thereof, and that the said plaintiff be forever quieted in the title and in the possession of all the aforesaid tracts of land. It is further considered by the court that the plaintiff recover of the defendant his costs of this suit, and that execution issue for the same.

THE STATE OF TEXAS, }
County of Brazoria. }

I, B. C. Jones, clerk of the district court in and for the county of Brazoria, do hereby certify that the foregoing seven and a half pages contain a full, true, and correct copy of all of the record or
45 papers in the suit of Peter MacGreal *vs.* Stewart Newell, numbered 1527 on the docket of said court, and decided in said court at the spring term thereof for the year A. D. 1850, on the 21st day of May in said year.

Witness B. C. Jones, clerk of the district court in and for the county of Brazoria, and the seal of said court this 25th day of May, A. D. 1850.

B. C. JONES,
Clerk D. C., C. B.

Recorded May 29th, 1850, at nine o'clock a. m.
W. R. BAKER, *Clerk.*

THE STATE OF TEXAS, }
County of Harris. }

I, J. S. Massie, clerk of the county court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of a decree as the same appears of record in my office in deed records, Book N, page 454, &c.

Witness J. S. Massie, clerk of said court, and the seal thereof, at office, in the city of Houston, this 12th day of November, 1890.

[SEAL.]

J. S. MASSIE,
Clk County Court, Harris Co., Tx.,
By C. B. FITZE.
Deputy Clerk.

And in connection with said proceedings and judgment defendants offered in evidence the deed of D. Russell, sheriff of Harris county, to Peter MacGreal, that had already been put in evidence by plaintiff, said deed being in words and figures as hereinbefore set forth.

46 And in connection with the offer of said proceedings and judgment and said deed it was admitted by the plaintiff and defendants that no other deed from D. Russell, sheriff, to Peter MacGreal appeared of record in said Harris county.

To the reading of said proceedings and judgment and said deed

in evidence the defendants objected upon the ground that said judgment was void for insufficiency of description of the 177 acres of land sued for by plaintiff in this action, in that said judgment only described said land as one of "the several tracts of land in plaintiff's petition mentioned and described," and said petition only described said land as "a certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of the town of Houston, about one mile from the capitol, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner," and that said deed of D. Russell, sheriff, to Peter MacGreal was inadmissible and incompetent to show and identify the 177 acres referred to in said petition and judgment, because the judgment was void, in that it failed to describe the land and the petition to which it referred failed to describe it; and the court sustained the objection so made by plaintiff and refused to allow said proceedings and judgment and said deed or either of them to be read and put in evidence by defendant, and they were accordingly excluded and not put in evidence.

47 To the judgment of the court sustaining said objection of plaintiff and refusing to admit said proceedings and judgment and said deed in evidence defendants excepted at the time and reserved the benefit of their exception. Defendants offered no further proof, but here rested their cause. The foregoing was all the testimony introduced before the jury by plaintiff and defendants in the trial of this cause.

And thereupon, before the court gave the case in charge to the jury, the defendants requested the court to charge the jury as follows:

"STEWART NEWELL
vs.
"ELIZA COOPER *et als.* } 1586.

"*Charge Requested by Defendants.*

"You are instructed that the land referred to in plaintiff's petition is not proved and identified by any evidence introduced by the plaintiff, and in the absence of evidence identifying it you will find for the defendants.

"O. T. HOLT AND HUME & KLEBERG,
"*Counsel for Defendants.*"

But the court refused to give said charge so requested by defendants; to which judgment of the court refusing to give said charge the defendants excepted at the time and reserved the benefit of their exceptions.

And thereupon the court charged the jury orally that the agreement of counsel fixed Peter MacGreal as the common source
48 of title, and that the deeds introduced by plaintiff, in the absence of other evidence, showed the title to the land sued for

to be in plaintiff, and that they should find and return a verdict for plaintiff for the land described in his petition.

And defendants then, before the jury retired, by their counsel, excepted to the said charge of the court upon the following points and in the following particular, viz:

The court erred in its said charge because—

There was no evidence before the jury of title in plaintiff to the land mentioned in plaintiff's petition; which exception was disallowed and overruled by the court, and to the said judgment of the court thereon the defendants at the time excepted and reserved the benefit of their exception.

And thereupon, after being thus charged by the court, the jury retired to consider of their verdict, and returned into court a verdict for the plaintiff as follows, to wit:

"We, the jury, find for the plaintiff the land as described in the petition.

"J. V. WHITE, *Foreman.*"

And upon the verdict so rendered the court thereupon rendered judgment for plaintiff for the land described and as described in his petition.

And the defendants, having excepted as aforesaid severally to each and every the said rulings and judgments of the court hereinbefore specified, and said exceptions having been severally allowed
49 by the court when made, now here tender this their bill of exceptions, in manner and form as hereinbefore stated, to each and every the said rulings and judgments of the court for allowance, signing, signature, and seal of the court, and pray that the same may be signed and sealed by the court and made part of the record in this cause, which is accordingly done.

DAVID E. BRYANT, *Judge.*

Indorsements: C. L. No. 1586. Stewart Newell *vs.* Eliza Cooper *et als.* Defendants' bill of exceptions. Filed March 28, 1891. C. Dart, clerk.

50 *Plaintiff's Bill of Exceptions. Filed March* 28, 1891.

United States Circuit Court, Galveston, March Term, 1891.

STEWART NEWELL }
v.
ELIZA COOPER *et al.* }

Be it remembered that the above cause came on for trial when defendant moved to strike out the plaintiff's replication to *plaintiff's* answer, setting up a judgment of the district court of Brazoria county, Texas, in which replication plaintiff alleged that at the institution of said suit he was a citizen of and resident in the State of Pennsylvania, and that he was in the State of Texas at the date of the institution of said suit, and that he had no knowledge of its pendency and was never served with process therein, and that he never employed any attorney to appear for him in said suit.

And at the same time plaintiff's motion to strike out and suppress the deposition of plaintiff taken by himself and filed herein to prove the facts set out in said replication, on the ground that said deposition tended and was taken for the purpose of attacking a judgment of the district court of Brazoria county, Texas, in a collateral way, when said motion was sustained by the court and said replication and deposition were stricken out and sup-
51 pressed; to which ruling of the court the plaintiff then and there, in open court, excepted to each and both of said rulings, and prays these bills of exceptions be signed and filed. Said exceptions were sustained by the court, because it understands the laws of Texas to be adverse to the plaintiff on said propositions, and this court, sitting in Texas, feels itself constrained to follow the Texas law on those points—that is, the courts of Texas hold this or such attacks to be collateral attacks, and this court should give it the same effect.

DAVID E. BRYANT, *Judge.*

Indorsements: C. L. No. 1586. Stewart Newell *v.* Eliza Cooper *et al.* Plaintiff's bill of exceptions. Filed March 28, 1891. C. Dart, clerk.

52 *Petition of Plaintiffs in Error for Writ of Error to U. S. Circuit Court, E. D. of Texas, and Their Assignment of Errors. Filed March 28, 1891. C. Dart, Clerk.*

UNITED STATES OF AMERICA:

In the Supreme Court of the United States. October Term, A. D. 1891.

ELIZA COOPER, B. P. COOPER, and Fannie Westrope, Plaintiffs in Error,	Error to the Circuit Court of the United States for the Eastern District of Texas, Sitting at Galveston.
vs.	
STEWART NEWELL, Defendant in Error.	

And the said plaintiffs in error, by O. T. Holt and Hume & Kleberg, their attorneys, come and say there is manifest error in the record and proceedings of the said circuit court for the eastern district of Texas, in this:

1. That the said circuit court allowed and permitted the plaintiff, Stewart Newell, to read and put in evidence on the trial of said cause the deed of Peter MacGreal to Stewart Newell, dated August 9, 1848, and overruled the objection made by the defendants, Eliza Cooper, B. P. Cooper, and Fannie Westrope, to the reading thereof as evi-
dence, said objection being that the description in said deed
53 of the 177-acres tract of land therein mentioned was insufficient to identify the land sued for by plaintiff and to authorize a judgment therefor.

2. That the said circuit court allowed and permitted the said

plaintiff to read and put in evidence on the trial of said cause the deed of D. Russell, sheriff of Harris county, to Peter MacGreal, dated June 22, 1847, and overruled the objection of said defendants to the reading thereof as evidence, said objection being that neither the allegations of the petition nor the reference in the said deed of Peter MacGreal to Stewart Newell to a deed made to said MacGreal by David Russell authorize the introduction of the deed so offered, because the description in said petition of the land sued for by plaintiff is other than and different from the description of land in said deed offered, and the deed referred to in said deed of Peter MacGreal to Stewart Newell is a deed from David Russell, whereas the deed offered in evidence is a deed from D. Russell, sheriff of Harris county.

3. That the said circuit court refused to admit in evidence on the trial of said cause upon the offer thereof in evidence by said defendants the certified copy of the proceedings and judgment of the district court of Brazoria county at its spring term, 1850, in the suit, No. 1257, of Peter MacGreal *vs.* Stewart Newell, and the said deed of D. Russell, sheriff, etc., to Peter MacGreal of June 22, 1847 (already put in evidence by said plaintiff), offered in evidence by said defendants in connection with said certified copy of
54 proceedings and judgment (it being admitted by plaintiff and defendants that no other deed from D. Russell, sheriff, etc., to Peter MacGreal than said deed of June 22, 1847, appears of record in said Harris county), and sustained said plaintiff's objection thereto. Said objection was that said judgment was void for insufficiency of description of the 177 acres of land sued for by plaintiff in this action, in that said judgment only described said land as one of "the several tracts of land in plaintiff's petition mentioned and described," and said petition only described said land as "a certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of the town of Houston, about one mile from the capitol, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner, and that said deed of D. Russell, sheriff, to Peter MacGreal was inadmissible and incompetent to show and identify the 177 acres referred to in said petition and judgment, because the judgment was void in that it did not describe the land and the petition to which it referred did not describe it.

4. That the said circuit court refused to give to the jury the charge requested by said defendants, viz: "You are instructed that the land referred to in plaintiff's petition is not proved and identified by any evidence introduced by the plaintiff, and in the ab-
55 sence of evidence identifying it you will find for the defendants."

5. That the said circuit court instructed the jury to find and return a verdict for said plaintiff for the land described in his petition.

6. That the said circuit court disallowed and overruled the exception of said defendants to its said charge, said exception being

that there was no evidence before the jury of title in plaintiff to the land mentioned in his petition.

That the said circuit court rendered judgment for the said plaintiff and against the said defendants, upon the whole record, for the land described in said plaintiff's petition and for costs.

8. That the said record is in divers other respects defective and void.

Wherefore, and by reason of the said several errors in the said record and proceedings of the said circuit court for the eastern district of Texas, the said Eliza Cooper, B. P. Cooper, and Fannie Westrope pray that the said judgment of the said court in the said record set forth may be reversed, set aside, and vacated.

O. T. HOLT AND HUME & KLEBERG,
Attorneys for Plaintiffs in Error.

56 Indorsements: No. 1586. United States Supreme Court, October term, A. D. 1891. Eliza Cooper, B. P. Cooper, and Fannie Westrope, plaintiffs in error, *vs.* Stewart Newell, defendant in error. Petition of plaintiffs in error for writ of error to U. S. circuit court, E. D. of Texas, and their assignment of errors. Filed March 28, 1891. C. Dart, clerk. O. T. Holt and Hume & Kleberg, attorneys for plaintiffs in error.

57 *Plaintiffs' Assignment of Errors. Filed April* 4, 1891.

In Circuit Court of the United States, Sitting at Galveston, Texas.

STEWART
vs.
ELIZA COOPER *et als.* } No. —.

Now comes the plaintiff in the court below and defendant in error and makes and files this his assignment of cross-errors, on which he seeks and prays the Supreme Court to pass *upon* and determine the questions involved therein, should the court from any cause reverse the judgment of the circuit court, for the reason that said questions are vital and important to the rights of parties litigant, and especially the defendant in error, should such reversal take place—

1st. It being alleged in the replication by plaintiff to the defendant's plea setting up the judgment of the district court of Brazoria county, Texas, that said judgment was procured by fraud, and that he, Stewart Newell, at the date of filing said suit, was not a citizen of or resident or within the State of Texas, but was at said date in the State of Pennsylvania and a citizen thereof; that he had no information or knowledge of the institution of said suit or judgment for many years thereafter, and that he never employed any one
58 or authorized the employment of any one to appear and file an answer in said Brazoria cause so set out, and that he was never served with process therein. He had the right to plead and prove these facts in this or any other suit where said suit and judgment might be invoked against him.

2d. The circuit court of the United States being a different jurisdiction and acting by authority of a different sovereignty, though sitting and holding sessions in Texas, and the question being a common-law question and not involving the construction of the constitution or any statute of the State of Texas, said circuit court had the same power and it was as much its duty to hear said replication and proof of the nullity of said Brazoria judgment as if it had been holding sessions in the State of New York in a suit on said judgment, and for all these reasons said circuit court on the trial of this cause erred in sustaining exceptions to said replication and in striking out said replication and deposition of said Stewart Newell.

JOHN IRELAND,
Attorney for Stewart Newell.

Indorsements: No. 1586, C. L. Stewart Newell *v.* Eliza Cooper *et al.* Plaintiff's assignment of errors. Filed April 4th, 1891. C. Dart, clerk.

59 *Writ of Error to Supreme Court. Filed March 28th*, 1891.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Stewart Newell, plaintiff, and Eliza Cooper, B. P. Cooper, and Fannie Westrope, defendants, wherein a judgment final was rendered in said circuit court, holding sessions at Galveston, on the 24th day of March, 1891, in favor of said plaintiff and against said defendants for the lands and premises sued for in plaintiff's petition, a manifest error hath happened, to the great damage of the said Eliza Cooper, B. P. Cooper, and Fannie Westrope, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
60 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] C. DART,
Clerk of the Circuit Court of the United States,
Eastern District of Texas, at Galveston.

Allowed by—
DAVID E. BRYANT, *Judge.*

Indorsements: C. L. 1586. Stewart Newell *v.* Eliza Cooper *et al.* Writ of error to Supreme Court. Filed March 28, 1891. C. Dart, clerk.

61 *Duplicate Writ of Error to Supreme Court. Filed March 28th, 1891.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Stewart Newell, plaintiff, and Eliza Cooper, B. P. Cooper, and Fannie Westrope, defendants, wherein a judgment final was rendered in said circuit court, holding sessions at Galveston, on the 24th day of March, 1891, in favor of said plaintiff and against said defendants for the lands and premises sued for in plaintiff's petition, a manifest error hath happened, to the great damage of the said Eliza Cooper, B. P. Cooper, and Fannie Westrope, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
62 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] C. DART,
Clerk of the Circuit Court of the United States,
Eastern District of Texas, at Galveston.

Allowed by—
DAVID E. BRYANT, *Judge.*

Indorsements: C. L. 1586. Stewart Newell *v.* Eliza Cooper *et als.* Duplicate writ of error to Supreme Court. This copy deposited in

clerk's office for defendant in error March 28, 1891. C. Dart, clerk. Filed March 28, 1891. C. Dart, clerk.

63 *Bond on Writ of Error. Filed March 28th*, 1891.

Know all men by these presents that we, Eliza Cooper, B. P. Cooper, and Fannie Westrope, as principal-, and John Wegner and Ben. Levy, as sureties, are held and firmly bound unto Stewart Newell in the full and just sum of five hundred dollars ($500.00), to be paid to the said Stewart Newell, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the aregular term of circuit court of the United States for the eastern district of Texas, at Galveston, on March 24, 1891, in a suit depending in said court between Stewart Newell, plaintiff, and Eliza Cooper, B. P. Cooper, and Fannie Westrope, defendants, a judgment was rendered against the said Eliza Cooper, B. P. Cooper, and Fannie Westrope; and the said Eliza Cooper, B. P. Cooper, and Fannie Westrope having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation di-

64 rected to the said Stewart Newell, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the 27th day of April next:

Now, the condition of the above obligation is such that if the said Eliza Cooper, B. P. Cooper, and Fannie Westrope shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ELIZA COOPER. [SEAL.]
B. P. COOPER. [SEAL.]
FANNIE WESTROPE. [SEAL.]

Sealed and delivered in presence of—
JOHN WEGNER. [SEAL.]
BEN. LEVY. [SEAL.]

Approved by—
DAVID E. BRYANT, *Judge.*

Personally appeared before me, the undersigned, U. S. commissioner for the eastern district of Texas, the above-named Eliza Cooper, B. P. Cooper, and Fannie Westrope, principals, and their sureties, John Wegner and Ben. Levy, who acknowledged in my presence that they signed, sealed, and delivered the foregoing instrument for the purposes and considerations therein set forth.

Done at Galveston, Texas, this the 28th day of March, A. D. 1891, as witness my hand and official seal.

[SEAL.] W. L. HANSCOM,
U. S. Commissioner, Eastern District, Texas.

65 *Oath to be Taken by Surety.*

I, John Wegner, do swear that I am worth in my own right at least the sum of 500.00, five hundred, dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth five hundred dollars or more.

JOHN WEGNER, *Surety.*

Sworn to and subscribed before me this the 28th day of March, A. D. 1891.

As witness my hand and official seal.

[SEAL.] W. L. HANSCOM,
U. S. Commissioner.

66 *Oath to be Taken by Surety.*

I, Ben. Levy, do swear that I am worth in my own right at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth five hundred dollars or more.

BEN. LEVY, *Surety.*

Sworn to and subscribed before me this the 28th day of March, A. D. 1891.

As witness my hand and official seal.

[SEAL.] W. L. HANSCOM,
U. S. Commissioner.

Indorsements: C. L. No. 1586. Stewart Newell *vs.* Eliza Cooper *et al.* Bond on writ of error of Eliza Cooper *et al.* Filed this the 28th day of March, A. D. 1891. C. Dart, clerk.

67 *Citation on Writ of Error. Filed March* 28, 1891.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Stewart Newell or to John Ireland or Lane & Mayfield, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 27th day of April next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Eliza Cooper, B. P. Cooper, and Fannie Westrope are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as

in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] DAVID E. BRYANT, *Judge.*

68 I hereby accept service of the within citation and waive service of a copy thereof.

Galveston, Texas, March 28th, 1891.

STEWART NEWELL,
Defendant in Error,
By JOHN IRELAND,
His Attorney.

Indorsements: C. L. 1586. Stewart Newell *v.* Eliza Cooper *et al.* Citation on writ of error. Filed March 28, 1891. C. Dart, clerk.

69 *Copy Citation on Writ of Error. Filed March* 28, 1891.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Stewart Newell or to John Ireland or Lane & Mayfield, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 27th day of April next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Eliza Cooper, B. P. Cooper, and Fannie Westrope are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] DAVID E. BRYANT, *Judge.*

70 I hereby accept service of the within citation and waive service of a copy thereof.

Galveston, Texas, March 28th, 1891.

STEWART NEWELL,
Defendant in Error,
By JOHN IRELAND,
His Attorney.

Indorsements: C. L. 1586. Stewart Newell *v.* Eliza Cooper *et al.* Copy citation on writ of error. Original endorsed: "Filed March 28th, 1891. C. Dart, clerk." Filed March 28, 1891. C. Dart, clerk.

71 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the

eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of the assignments of errors and of all proceedings in cause No. 1586 on the law docket of said court, entitled Stewart Newell *vs.* Eliza Cooper, B. P. Cooper, and Fannie Westrope, as the same now appears of record and on file in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 8th day of April, A. D. 189–.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T.,
By —— ——, *Deputy.*

[Endorsed:] No. 1586. United States circuit court, eastern district of Texas. Stewart Newell *vs.* Eliza Cooper *et al.* Copy of the record and of the assignment of errors, etc.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Stewart Newell, plaintiff, and Eliza Cooper, B. P. Cooper, and Fannie Westrope, defendants, wherein a judgment final was rendered in said circuit court, holding sessions at Galveston, on the 24th day of March, 1891, in favor of said plaintiff and against said defendants for the lands and premises sued for in plaintiff's petition, a manifest error hath happened, to the great damage of the said Eliza Cooper, B. P. Cooper, and Fannie Westrope, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Seal United States Circuit Court, Eastern District of Texas.

C. DART,
Clerk of the Circuit Court of the United States,
Eastern District of Texas, at Galveston.

Allowed by—
DAVID E. BRYANT, *Judge.*

[Endorsed:] C. L. 1586. Stewart Newell *vs.* Eliza Cooper *et al.* Writ of error to Supreme Court. Filed March 28, 1891. C. Dart, clerk.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Stewart Newell or to John Ireland or Lane & Mayfield, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 27th day of April next, pursuant to a writ of error filed in the clerk's office of the eastern district of Texas, holding sessions at Galveston, wherein Eliza Cooper, B. P. Cooper, and Fannie Westrope are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Circuit Court, Eastern District of Texas.]

DAVID E. BRYANT, *Judge.*

74 [Endorsed:] C. L. 1586. Stewart Newell *vs.* Eliza Cooper *et al.* Citation on writ of error. Filed March 28, 1891. C. Dart, clerk.

I hereby accept service of the within citation and waive service of a copy thereof.

Galveston, Texas, March 28th, 1891.

STEWART NEWELL,
Defendant in Error,
By JOHN IRELAND,
His Attorney.

Endorsed on cover: E. Texas C. C. U. S. No. 1716. Eliza Cooper, B. P. Cooper, and Fannie Westrope, plaintiffs in error, *vs.* Stewart Newell. Filed April 18, 1891.

155-532

155-532

Office Supreme Court U. S.
FILED,
DEC 21 1891
JAMES H. McKENNEY,
Clerk

No. 1716.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

ELIZA COOPER, B. P. COOPER AND FANNIE WEST ROPE, PLAINTIFFS IN ERROR,

vs

STEWART NEWELL, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Brief for Plaintiffs in Error by
F. CHARLES HUME, Counsel.

F. J. Finck & Co., Printers, Galveston, Texas.

No. 1716.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

ELIZA COOPER, B. P. COOPER AND FANNIE WESTROPE

vs.

STEWART NEWELL.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

STATEMENT OF THE CASE.

On July 5, 1890, Stewart Newell, plaintiff below and defendant in error here, filed his petition in the ordinary form of trespass to try title, as known to the practice in Texas, to recover of Eliza Cooper, B. P. Cooper and FannieWestrope, defendants below and plaintiffs in error here, 177 acres of land in Harris county, Texas (Trans. 2).

The issues with plaintiff upon the merits at the time the action was tried were presented by defendants' second amended original answer, filed March 9, 1891 (in lieu of their first amended original answer filed December 4, 1890), pleading the general issue of "not guilty" and special pleas of limitations and non-entry (Trans. 5-6).

The parts of the record presenting these issues and the trial and proceedings had in disposing of them, are thought to present *all* of the record calling for or permitting the

court's consideration upon this writ of error, for reasons hereinafter to be stated. But, as defendant in error seems to regard other parts of the record as authorizing examination here, it may be appropriate to present them in this preliminary abstract of the case.

Prior to the jury trial on the merits the court had sustained defendants' demurrer (Trans. 4) to plaintiff's replication (Trans. 3-4) to defendants' first amended original answer of December 4, 1890, in so far as said replication was a collateral attack on a judgment therein referred to as having been rendered for said land in Brazoria county, Texas, May 20, 1850, in favor of one Peter McGreal and against plaintiff (Trans. 7-3).

The replication (Trans. 3-4) averred, in effect, that the judgment named was null and void.

The averment was rested on the claims:

1. That plaintiff (defendant in that judgment) never at any time resided in Brazoria county, and that at the time the judgment was rendered he was neither a resident of nor within said county or State.

2. That plaintiff, in 1848, removed from Galveston, Texas, to Philadelphia, Pa., where he resided continuously until 1854, when he removed to New York, where he has ever since resided, being a citizen of said Pennsylvania and New York, respectively, during the said respective periods of his residence therein.

3. That he was never served with citation or process in said suit nor otherwise notified of the existence thereof; that he was not a party thereto, with his knowledge, consent or approval; that he did not submit himself to the jurisdiction of the court; that he neither employed nor authorized the employment of anyone to represent or enter an appearance for him in said suit and knew nothing of it until 1875; and, finally, that if any attorney appeared for him in said suit, he did so without plaintiff's knowledge or authority and through collusion with plaintiff therein to injure and defraud him.

As before recited, the court sustained (Trans. 7-3) defendants' demurrer to this replication.

The propositions made by the demurrer were substantially that it appeared from the allegations of plaintiff:

1. That the replication was a collateral attack upon the judgment of the District Court of Brazoria county, in the State of Texas, and within the said eastern district thereof, being a court of general jurisdiction of the parties and the subject matter connected with and involved in said judgment.

2. That said judgment is a domestic judgment, assailable only by a direct proceeding to impeach it.

3. That said judgment is a domestic judgment, assailable only by a direct proceeding to impeach it in the court where rendered, or by writ of error to that court.

4. That plaintiff has had full knowledge of said suit and judgment since the year 1875, and has taken no proceeding to review, appeal from, vacate or qualify said judgment, and his right to assail it is now barred by limitation and lost by laches.

5. That plaintiff does not claim to have, or to have had at any time, a meritorious defense to said suit wherein said judgment was rendered (Trans. 4-5).

Plaintiff also took a bill of exceptions (Trans. 22-3).

It recites that defendant's motion to strike out plaintiff's replication to *plaintiff's* (meaning defendant's) answer setting up a judgment of the District Court of Brazoria county, Texas, in which replication plaintiff alleged his non-citizenship in Texas when the Brazoria suit was instituted, his ignorance of the suit, and that he was never served with process and never employed counsel to appear for him therein, and also that *plaintiff's* (meaning defendant's) motion to strike out and suppress the deposition of plaintiff, taken by himself in his own behalf to prove the facts averred in said replication, on the ground that said deposition tended and was taken for the purpose of attacking the said Brazoria judgment in a collateral way, were sustained by the court

and said replication and deposition stricken out, plaintiff excepting.

The bill recites that defendant's "exceptions" were sustained by the court because the laws of Texas are "adverse to plaintiff on said propositions" — that is, that courts of Texas hold such attacks to be collateral — and the court, siting in Texas, is constrained to the same holding.

On April 4, 1891, defendant in error filed what he terms his "assignment of cross errors," which he prays may be considered by this court in the event of the reversal by it of the judgment of the Circuit Court. The "cross errors" assigned are, in substance:

1. That to defendants' plea setting up the Brazoria county judgment plaintiff's replication averred that said judgment was procured by fraud; that he was not a citizen or a resident of Texas nor within the State when the suit for said judgment was filed, but was in and a citizen of the State of Pennsylvania; that he was ignorant of the suit and judgment for many years thereafter; that he was never served with process in said suit and never employed or authorized the employment of anyone to appear and answer therein.

He asserted the right to plead and prove these facts in the pending suit or in any other suit wherein said Brazoria suit and judgment might be invoked against him.

2. That the United States Circuit Court being the court of a different sovereignty, although sitting in Texas, should hear evidence to the nullity of the Brazoria judgment, as if it were "holding sessions in the State of New York in a suit on said judgment," the question being a common law question and not involving the construction of the constitution or any statute of Texas.

He claimed that for these reasons the Circuit Court erred in striking out his deposition and in sustaining exceptions to his replication (Trans. 25-6).

Unless the mere taking of exceptions and filing assignment of "cross errors" by defendant in error entitles him to be heard here otherwise than in support of the judgment below, the matters embraced in his assignment cannot be

considered. He has neither asked for nor procured a writ of error.

Recurring, therefore, to the issues joined between the parties by plaintiff's petition (Trans. 2) and defendant's second amended original answer (Trans. 5-6) and the proceedings in and result of the trial of those issues, as presenting the only matters properly before the court here for decision, we proceed with the statement.

The trial was by jury and resulted in verdict and judgment for plaintiff for the land sued for (Trans. 7-8).

Defendants took their writ of error (Trans. 26-32).

The questions made by defendants in the court below and stated in their assignment of errors incorporated in their petition as plaintiffs in error for a writ of error (Trans. 23-4) arose upon the trial of the cause to the jury and were reserved by bill of exceptions (Trans. 10-22).

FIRST.

Of the several errors thus assigned but one is here assigned and relied upon for the reversal of the judgment below, viz.:

3. That the said Circuit Court refused to admit in evidence on the trial of said cause upon the offer thereof in evidence by said defendants the certified copy of the proceedings and judgment of the District Court of Harris county at its spring term, 1850, in the suit No. 1527 of Peter Mac Gruder vs. Wm. Newell and the said deed of D. Russell, sheriff, etc., to Peter Mac Gruder of June 22, 1847, already put in evidence by said plaintiff in error, and read in evidence by said defendants in connection with said certified copy of proceedings and judgment, it being admitted by plaintiffs and defendants that no other deed from D. Russell, sheriff, etc., to Peter Mac Gruder than said deed of June 22, 1847, appears of record in said Harris county, and sustained said plaintiff's objection thereto.

Said objection was that said judgment was void for insufficiency of description of the land sued for by plaintiff in this action, in that said judgment only described said land as one of 'the several tracts of land in plaintiff's petition mentioned and described,' and said petition only described said land as 'a certain other tract or parcel of land lying in the county of Harris, containng 177

acres, being a part of the town tract of the town of Houston, about one mile from the capitol, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner,' and that said deed of D. Russell, sheriff, to Peter MacGreal, was inadmissible and incompetent to show and identify the 177 acres ferred to in said petition and judgment, because the judgment was void in that it did not describe the land and the petition to which it referred did not describe it (Trans. 24).

To make the point of the assignment clear it is necessary to show the state of the cause upon the pleadings and evidence, at the time the alleged error of the court, in excluding the evidence referred to, was committed.

The premises sued for are described in plaintiff's petition thus:

—a part of the Luke Moore league, and the part thereof in controversy in this suit is described as follows, to-wit: Beginning at a gum S. 70° E. 500 varas from N. W. corner of Luke Moore League for northwest corner and which is the northeast corner of lot No. 1, thence S. 20° W. 2000 varas to a pine 2½ feet diameter for the S. W. corner, and which is the S. E. corner of lot No. 3; thence S. 70°, E. 500 varas to a post oak 3 inches diameter for S. E. corner; thence N. 20° E. 2000 varas to a gum 4 inches in diameter on the northeast boundary line of Luke Moore league; thence north 70°, W. 500 varas with said Moore's northeast boundary line to the place of beginning, containing 177 acres of land, comprising lots 2 and 4 (Trans. 2).

The bill of exceptions shows the following facts:

It was admitted by the parties that Peter MacGreal was the common source of title, and the land sued for was proved to be of the value of $10,000 (Trans. 10).

Following this admission and proof, plaintiff, to maintain his title, put in evidence a deed of Peter MacGreal to himself (plaintiff) of August 9, 1848, conveying several tracts of land, among them a tract therein described as:

177 acres of land in the town tract of Houston, in Harris county, about one mile from the capitol, and being the same tract conveyed to me by deed from David Russell, duly recorded in said county of Harris, which said deed is referred to and made part hereof (Trans. 10-12).

Plaintiff then put in evidence a deed of D. Russell, sheriff of Harris county, to Peter MacGreal, of June 22, 1847, claim-

ing and proposing thereby to show the description of the 177 acres sued for by him and referred to in said deed first introduced (Trans. 12-13).

This sheriff's deed, in effect, recites a sale by the sheriff under a writ of *renditioni exponas* to Peter MacGreal of lots 2 and 4, containing 88½ acres each, situated in said Harris county, between Buffalo and Bray's Bayous, about one and one quarter miles from the city of Houston and about three and one half miles from the town of Harrisburg, and

being the northwest part of a league of land originally granted to Luke Moore, now generally known and designated as lots Nos. 2 and 4 in the western division of said league.

Field notes embracing said lots 2 and 4—each lot containing 88½ acres and the description comprising both, being an aggregate of 177 acres—then follow, in terms substantially the same as those used in plaintiff's petition, as hereinbefore recited (Trans. 13-14).

At this point, having put in evidence said two deeds just described, plaintiff rested his case (Trans. 15).

Thereupon, to maintain their defense, defendants put in evidence a deed of Peter MacGreal to Thomas E. Westrope, of March 2, 1860, conveying lots Nos. 2 and 4, containing each 88½ acres, near the town of Houston, being parts of the Luke Moore grant, and the same tracts theretofore bought by said MacGreal at sheriff's sale (Trans. 15).

It was admitted by both parties that by a decree of court in 1864 the estate of said Westrope was partitioned among his heirs and the property named in said deed of MacGreal to Westrope was allotted and adjudged to defendant Eliza Cooper, then Eliza Westrope, and to defendant, Fannie Westrope, they being heirs of the said Thomas E. Westrope, and that said Eliza Cooper is now the wife of defendant B. P. Cooper (Trans. 16).

Defendants then offered in evidence the certified copy of the proceedings and judgment of the District Court of Brazoria county, at the spring term, 1850, in the suit No. 1527, of Peter McGreal vs. Stewart Newell (Trans. 16-17); and in

connection therewith defendants offered in evidence the deed of D. Russell, sheriff, etc., to Peter MacGreal, already put in evidence by plaintiff, and it was admitted by both parties that no other deed from D. Russell, sheriff, to Peter MacGreal appeared of record in Harris county (Trans. 20).

The proceedings of the Brazoria court consisted of a petition by MacGreal against Newell, each being described as a "resident citizen of the county of Brazoria," complaining that Newell, in February, 1850, with force and arms, entered upon, etc., certain described tracts of land among them the tract of 177 acres, the subject matter of controversy in the case at bar) and praying judgment the 26th—demurrer and answer by defendant Newell reciting: "And now comes the defendant, Stewart Newell," etc, and signed by "J. A. Swett, attorney for defendant"—judgment of court, reciting the presence of the parties "by their respective attorneys," and overruling defendant's demurrer to petition—verdict and judgment, May 21, 1850, for plaintiff MacGreal and against defendant Newell for the land claimed by plaintiff (Trans. 17-20).

To the reading of said proceedings and judgment and said deed in evidence plaintiff objected upon the ground:

That said judgment was void for insufficiency of description of the 177 acres of land sued for by plaintiff in this action, in that said judgment only described said land as one of the several tracts of land in plaintiff's petition mentioned and described, and said petition only described said land as "a certain other tract or parcel of land "lying in the county of Harris, containing 177 acres, being a part of "the town tract of the town of Houston, about one mile from the capital, and being the same tract bought at sheriff's sale and conveyed "by David Russell, sheriff of Harris county, to petitioner," and that said deed of D. Russell, sheriff, to Peter MacGreal was inadmissible and incompetent to show and identify the 177 acres referred to in said petition and judgment, because the judgment was void in that it failed to describe the land and the petition to which it referred failed to describe it (Transcript 20-21).

The court sustained the objection and refused to allow said proceedings and judgment and said deed, or either of them, to be read and put in evidence by defendants, and defendants excepted (Trans. 21).

Neither party offered further evidence and the cause was rested (Trans. 21).

The respective descriptions of the land in the petition and judgment in the Brazoria suit were as given in plaintiff's objection quoted *supra* (Trans.: Petition, 17; judgment, 20; plaintiff's objection, 21).

The description of the 177 acres contained in the deed of D. Russell sheriff, to Peter MacGreal, offered in evidence by defendants in connection with their offer of the proceedings and judgment in the Brazoria suit is given, in substance, *supra*, in connection with our reference to the introduction of that deed by plaintiff.

The evidence being closed the court instructed the jury orally that the agreement of counsel fixed Peter MacGreal as the common source of title, and that the deeds introduced by plaintiff, in the absence of other evidence, showed the title to the land sued for to be in plaintiff, and to render a verdict for plaintiff for the land described in his petition (Trans. 21-22).

Verdict and judgment were rendered accordingly, defendants excepting (Trans. 22, 7-8).

So that the case stood thus:

Plaintiff having shown a deed of August 9, 1848, from Peter MacGreal, the common source of title, to himself, and a deed of June 22, 1847, from D. Russell, sheriff, to said Peter MacGreal, was held entitled to recover—although defendants had proved title by deed of March 2, 1860, from said Peter MacGreal to their ancestor, Thomas E. Westrope, and offered to prove that said MacGreal was vested with title to the land thus conveyed to their ancestor by the proceedings and judgment in the Brazoria suit of May 21, 1850, and that the land was the same conveyed by D. Russell, sheriff, to said MacGreal by said deed of June 22, 1847.

Had the court admitted the evidence offered by defendants the title of the latter would have been clear; for the proceedings and judgment of the Brazoria court would have

showed that the title vested in plaintiff by MacGeal's deed of August 9, 1848, was reinvested in MacGreal by said proceedings and judgment of May 21, 1850, and the deed of June 22, 1847, referred to in said proceedings and already put in evidence by the plaintiff, would have shown the identity of the land sued for with that described in plaintiff's petition in the Brazoria suit; and the deed of March 2, 1860, from MacGreal to defendants' ancestor, We trope put in evidence by defendants, showed that after reinvesture of title title in MacGreal he had conveyed the land to defendants' said ancestor.

In other words, the rejected evidence, had it been admitted, would have shown that plaintiff Newell had no title and that the title claimed by him was in the defendants' Cooper et als.

SECOND.

We here assign as ground for reversal, the further error:

That the court had no jurisdiction of the cause; in that the citizenship of the defendants is not disclosed by the record.

The petition complains of defendants "all residents of Galveston county, in the State of Texas" (Trans. 2).

Nothing further on the subject is reflected by the record.

ARGUMENT.

I.

The second assigned error is presented first, as it is believed to be fatal to the judgment below and to require its reversal.

It is:

That the court had no jurisdiction of the cause; in that the citizenship of the defendants is not disclosed by the record

The citizenship of defendants is nowhere shown by the record. Nothing appears but that defendants are complained of as "all residents of Galveston county, in the State of Texas" (Trans. 2).

Menard vs. Goggan, 121 U. S. 253.

Johnson vs. Christian, 125 U. S. 642.
Robertson vs. Cease, 97 U S. 647.
Halstead vs. Buster, 119 U. S. 342.
Grace vs. American Central Insurance Company, 109 U. S. 278, 283-4.
M., C. and L. M. R'y Co. vs. Swan, 111 U. S. 379, 382.
Continental Insurance Company vs. Rhoads, 119 U. 237, 239-240.
Everhart vs. Huntsville College, 120 U. S. 228.
Cameron vs. Hodges, 127 U. S. 322, 325-6.

II.

The remaining error assigned and here relied on is the one numbered 3 of those appearing in the assignment incorporated in the petition for writ of error, being the first stated in the foregoing specifications of error contained in the statement of the case wherein the manner in which the point involved arose is fully explained by reference to the record.

As a proposition to be maintained by argument it may, however, be convenient to repeat, in this place, the assignment now to be considered:

3. That the said Circuit Court refused to admit in evidence on the trial of said cause upon the offer thereof in evidence by said defendants the certified copy of the proceedings and judgment of the District Court of Brazoria county at its spring term, 1850, in the suit, No. 1527, of Peter MacGreal vs. Stewart Newell, and the said deed of D. Russell, sheriff, etc., to Peter MacGreal, of June 22, 1847, already put in evidence by said plaintiff, offered in evidence by said defendants in connection with said certified copy of proceedings and judgment, it being admitted by plaintiff and defendants that no other deed from D. Russell, sheriff, etc., to Peter MacGreal than said deed of June 22, 1847, appears of record in said Harris county, and sustained said plaintiff's objection thereto.

Said objection was that said judgment was *void for insufficiency of description* of the 177 acres of land sued for by plaintiff in this action, in that said judgment only described said land as one of "the several tracts of land in plaintiff's petition, mentioned and described," and said petition only described said land as "a certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of the town of Houston, about one mile from the capital, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner," and that said deed of D. Russell, sheriff, to Peter MacGreal was inadmissible and incompetent to show and identify the 177 acres referred to in said petition and judgment; *because the judgment was void, in that it did not describe the land, and the petition to which it referred did not describe it* (Trans. 24).

The court in excluding the evidence offered proceeded upon the assumption, that a judgment for land is *void*—and that, too, when assailed *collaterally*—if it identifies the land only by reference to the plaintiff's petition, which, though not in itself containing a full description of the land, refers to a deed containing such description.

This assumption is believed to be unfounded—in this jurisdiction at least.

Not less in a judgment than in a deed is a description certain, which can be made certain by reference to a deed or other written instrument.

Rogers vs. McLaven, 53 Tex. 423;
Steinbeck vs. Stone, Id. 380;
Wilson vs. Smith, 50 Tex. 305;
Nass vs. Chadwick, 76 Tex. 572;
Westmoreland & Co. vs. Carson, Sewell & Co., Id., 619—all *direct* attacks upon *judgments* for insufficient descriptions of land;

Knowles vs. Toubet, 53 Tex. 557; *a collateral* attack on judgment upon the same ground.

Land Company vs Chisholm, 71 Tex. 526, and Wright vs. Lassiter, Id., 043-4—alleged insufficiency of descriptions of land in *deeds*, in the latter case, a *sheriff's* deed.

The two cases cited from 71 Tex., pp. 526, 643-4, sufficiently reflect the uniform course of decision in Texas, that a *deed* can be made certain by description contained in another deed, or written instrument, therein referred to. They are not cited, however, to support that doctrine, since it is thought to be well established everywhere; but are cited, mainly, to show that in both of them a case (Steinbeck vs. Stone, 53 Tex. 382) involving the question of the sufficiency of description in a *judgment*, is relied on as authority for the sufficiency of description in a *deed*.

It may, indeed, be said that in Texas, the cases of each class uniformly refer to the cases of the other class as authority—thus implying that the same rule (admitting reference to other paper for description) applies to both classes.

It can make no difference that the reference to the deed is contained in the petition referred to by the judgment and not in the judgment itself. The judgment by referring to the petition for description adopts the reference made by the petition. The latter is a filed paper, a necessary part of the record, and the judgment by referring to it for description incorporates the description and descriptive reference therein contained.

In other words: The point presented is precisely the same that would be presented did the judgment itself contain the description and reference contained in the petition.

It is thought to be abundantly ruled that a judgment for land, describing it by referring to a deed for description thereof, is not *void for want of description*—especially upon *collateral* attack; and that the deed referred to is, if not otherwise objectionable, competent evidence of description and identity.

And a court asked to sustain a collateral assault upon a judgment on the ground taken in this case, must presume, in support of the judgment, that the court rendering it had before it, in evidence, the descriptive deed referred to.

Rogers vs. McLaren, 53 Tex. 423, is a case not distinguishable from this, in principle.

It is not so strong a case as this, because there the attack upon the judgment is *direct*—by appeal.

McLaren, as transferee of a certain note, sued to recover balance due thereon and to foreclose vendor's lien on land for which it was alleged to note was given.

The note was copied in the petition and made part thereof. It was executed by W. E. Rogers to Wade Horton, or bearer. It is here recited, because from its confused terms and its description of the land, one of the main contentions in the case arose:

$1229. On or before the first day of January, 1875, I promise to pay to Wade Horton, or bearer, the sum of twelve hundred and twenty-six ($1226) coined dollars, with interest at 10 per cent from date until paid.

The above note is given as part payment on a one thousand sixty-three acre tract of land, this day sold *by me to him, the said Rogers*, in Bosque county, out of the south half of the William Shepard league and labor, said deed of conveyance bearing even date with this note, said note constituting a vendor's lien on said land for the purchase money of the same, this October 6, 1873. W. E. ROGERS.

Than the foregoing, the petition contained no description of the land, save by reference, for better description, to a deed thereto by Wade Horton to W. E. Rogers, alleged to be in the possession of Rogers, who was notified to produce it.

The judgment foreclosed the lien on 1063 acres, part of William Shepard's league and labor:

described in deed of conveyance from Wade Horton to defendant W. E. Rogers, dated the 6th day of October, 1873, and recorded book M, pages 201, 202 and 203 of said Bosque county deed records.

On appeal, reversal was insisted on, because:

1. The description of the land in the judgment is different from the description in the petition.

2. *No land is described in the petition.*

3. Description in judgment varies from that in petition, in that petition makes no reference to pages and books of record. (See for this statement of the issues pp. 424-5 of the report.)

The court, after observing that the only question in the case is that of the sufficiency of the description of the land upon which the vendor's lien was enforced, affirms the judgment (Opinion p. 426).

The opinion declares that the confusion as to description arising from recitals in the note is obviated by the subsequent allegation referring to Horton's deed to Rogers for better description; and that the additional description in the judgment of the deed averred in the pleadings, by reference to registry book and page, is no variance from the pleadings, and, *in the absence of a statement of facts, must be presumed to have been sustained by the evidence.*

The italicized words guard against the adoption of an error, which a casual reading of the reporter's statement might otherwise convey. On page 425, the reporter, while observing that there was no statement of facts, adds that a copy of Horton's deed to Rogers, describing the land specifically, was incorporated in the transcript.

Obviously such copy could constitute no part of the "record," and was not and could not have been considered by the court. The court expressly declares:

> In this case there is no statement of facts, and every reasonable presumption should be indulged in favor of the judgment below (p. 426).

The case has been thus stated at length, because arising and decided in the local jurisdiction. The clear import of the decision goes far beyond the requirements of our contention in the case at bar.

It holds certainly that a judgment is sufficiently descriptive of land when it refers to a deed for description, without itself reciting the description contained in the deed. By necessary implication it holds further:

That a petition describing land as a tract of specified acreage, conveyed on a named day by deed from A to B, out of a designated half of a given league and labor in a named county and State, and referring to said deed for better description is sufficient to authorize a judgment for the land, describing it by reference to said deed, in the absence of

facts showing that the descriptive deed was not before the court as the basis of its judgment and upon the presumption that such deed was in evidence and the description therein contained satisfactory to the court.

Undoubtedly, here was a case holding a judgment sufficient, which described the land not otherwise than by reference to a description thereof contained in a deed referred to, but *not shown* to have been *actually* before the court at all. The presumptions always indulged in support of a judgment were deemed sufficient to warrant the conclusion that, in fact, the deed referred to *was* before the court.

Take away from the judgment the reference to the deed from Horton to Rogers, and there remains *no* description upon which the judgment can rest.

If it be true then, as we assume, that the Brazoria proceedings and judgment excluded by the court were in legal effect the same as they would have been had the reference to the descriptive deed appeared in the judgment itself and not in the petition referred to by the judgment, it must be true that according to the case cited, the Brazoria judgment is not *void*.

The petition in the Brazoria case contained a description of the land certainly not less exact than did the first deed put in evidence by plaintiff that of August 9, 1848, by MacGreal to Newell (Trans. 11); and the reference by that deed to the deed of Russell, sheriff, to MacGreal was deemed sufficient by the court to support the offer of the latter deed in evidence by the plaintiff. And yet the court excluded, when offered by defendants, not only the petition and judgment in the Brazoria case, but the sheriff's deed to Russell, referred to in the petition, as well—although *already in evidence* in behalf of the plaintiff.

To make this point clear, the descriptions contained in the deed of MacGreal to Newell, and in the petition in the Brazoria case, respectively, are presented in parallel columns

Description in deed of MacGreal to Newall:

177 acres of land in the town tract of Houston, in Harris county, about one mile from the Capitol, and being the same tract conveyed to me by deed from David Russell, duly recorded in said county of Harris, which said deed is referred to and made part hereof.

Transcript 11.

Description in petition in Brazoria case:

A certain other tract or parcel of land lying in the county of Harris, containing 177 acres, being a part of the town tract of the town of Houston, about one mile from the Capitol, and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner.

Transcript 17.

It can not be said that the one description and reference to descriptive deed is competent, and that the other description and reference to descriptive deed is incompetent, on the ground that the first is used in a voluntary conveyance, and the second in an adversary proceeding.

Whatever may be the presumptions and intendments ascribed to a voluntary, and denied to an involuntary conveyance, is not a question open to consideration upon this record.

The point of objection to the Brazoria record was not that the description therein of the land was any the more insufficient because appearing in a court record of an adversary proceeding than it would be if contained in a voluntary conveyance; but that such record could not confirm and verify itself by any descriptive reference whatever—*because it must be void* if it fails *in its own terms, or in the terms of the pleading invoking it*, to fully ~~decide~~ the land; and this, too notwithstanding it refers to a specific descriptive deed, which, in the absence of evidence to the contrary, the law presumes, was before the court when the judgment was rendered and supplied the proof to warrant and support the judgment.

No objection was made to the descriptive deed as being wanting in any element of proper description, nor as failing to correspond to the descriptive allegations of the Brazoria petition. Indeed, the plaintiff was estopped to impugn its descriptive sufficiency; for he had himself introduced it and his title depended on it.

The sole opposition to its introduction in evidence by defendants rested upon the claim that *the judgment itself* was *void, in that* neither *the judgment* nor *the petition* to which it referred, described the land.

(Trans. 21-24.)

The contention is an unqualified negation of the decision and doctrine of McLaren vs. Rogers, *supra*, and should not be maintained by a court sitting to administer the laws of Texas.

Steinbeck vs. *Stone*, 53 Tex. 386, refers with approval to the former case of Norris vs. Hunt, 51 Tex. 614, as announcing "that the true rule deduced from the authorities as to certainty in the description of land is, that it should be so definite and certain upon the face of the instrument itself, *or by other writing referred to*, that the land can be identified with reasonable certainty;" and the court applied the rule to the case of a *judgment* foreclosing a vendor's lien on land described in both petition and judgment, by reference to deeds not made part of the record, nor, apparently put in evidence or otherwise exhibited, and affirms the judgment as sufficiently descriptive, even against direct assault. (382-6.)

To reverse the judgment, it was contended that the description was insufficient because it identified no particular tract of land, but referred to other deeds. (383.)

To maintain the judgment, it was claimed that a judgment, *like a deed*, was sufficiently descriptive of land if it referred to descriptive deeds. (385.)

The description was thus:—

It being and lying situated in McLennan County, State of Texas, being the west portion of the original Gill place, or all of that land that was deeded to W. Scott, by Mrs. S. H. Gill, January 6, 1871, said deed filed for record, January 18, 1871, and recorded in McLennan county deed book N pp. 690-691, Jan 21, 1871, except so much of said tract, to wit: 177 acres that were deeded to R.F. Scott, of Harrison County, Tex., as shown by deed from W Scott to said R F. Scott, and for a more particular description of the land hereby conveyed to said Steinbeck reference is here made to the two deeds herein mentioned, and also to deed from W. Scott to R. D. Scott, all of which

are recorded in the Clerk's office of McLennan County. (Trans. 385-6).

It will be observed, that if the reference in the foregoing to descriptive deeds is eliminated there will remain no identifying description. Certainly a far more ambiguous description than that contained in the Brazoria petition, if we omit from it the reference to the deed of David Russell, sheriff.

Understanding "the true rule deduced from the authorities" to apply to *judgments* as well as to deeds, the court said:

> Tested by this rule we think the description in this case sufficient. The county in which the land is situated and the name of the tract are given, *and three recorded deeds are referred to for more particular certainty.* Berry vs. Wright, 14 Tex. 270; Early vs. Sterrett, 18 Tex. 116; Kingston vs. Pickens, 46 Tex. 90; Ragsdale vs. Robinson, 48 Tex. 379; Wilson vs. Smith, 50 Tex. 395. (580).

Most of the cases cited by the court involve the question of sufficiency of description in *deeds*; the last one (Wilson vs. Smith, 50 Tex. 365) pronounces sufficient a most "indefinite" description in a *judgment, levy,* and *Sheriff's deed.*

Knowles vs. *Torbet*, 53 Tex. 557-8, was the case of an unsuccessful effort to impeach collaterally, as void for want of certainty in the description of the land, a *judgment* enforcing the vendor's lien; and, for the same reason, to reject *Sheriff's deed* made under order of sale, issued *in pursuance of the judgment.*

The description was thus:

> Two hundred and ninety five acres of land surveyed by virtue of a certificate originally granted to one Leonard S. Williams, in one tract, twenty-five acres surveyed by virtue of the same certificate, in another tract; forty acres of land in another tract, surveyed by virtue of land Scrip No. ... issued to Ishmael Kyle; and one hundred and sixty acres of land, surveyed for and patented to F. M. Taylor, as his pre-emption claim; all and each of said tracts of land lying and being in the county of McLennan (558).

The court said:

> The record, however, shows that only the two tracts for twenty-five and one hundred and sixty acres, were embraced in the judgment. *It does not affirmatively appear* by what the description of the land

contained the whole of the several tracts embraced in the judgment and the Sheriff's deed. The county in which situated, the number of acres in each tract, and the designation of the particular claim by which located, and set out, and under the authority of adjudicated cases, the description is sufficient. Flannagan vs. Boggess, 46 Tex. 330; Steinbeck vs. Stone, decided at present term and authorities cited.

This case presents a different question from that in Wofford vs. McKinna, 23 Tex. 36, Davenport vs. Chilton, 25 Tex. 519; Pressley vs. Testard, 29 Tex. 201; and Norris vs. Hunt, 51 Tex. 609, in which the lands purported to be conveyed appeared to be undefined parts of larger tracts, and in which the ambiguity was patent upon the face of the instruments.

Under the modern practice in ejectment, for reasons peculiar to that action, a general description of the premises sued for is good, unless a different rule is prescribed by statute. Tyler on ejectment, 393 (558-9).

The purport of the decision is, that, as against collateral attack, a judgment describing land not otherwise than by naming the county where located, the number of acres in each tract and the particular claim by which located, will be sustained—in the absence of affirmative evidence that the tracts adjudged are not in fact embraced in a description purporting to contain these and other tracts as well, and are not within boundaries corresponding to the terms of the description. The court presumes against collateral attack, that the tracts named in the judgment, have been identified, by evidence on the trial as being embraced in the larger description, and also, as lying within definite boundaries, answering to the designations of location, acreage and claim.

Applying the doctrine to the case at bar, we find that the description contained in the Brazoria petition (*supra*) is not less exact than the description adjudged to be sufficient; and it should have been presumed in this case not less than in that, that there was satisfactory evidence before the court of the location and boundaries of the 177 acre tract, identifying it as corresponding to the terms of description used in the petition and incorporated by reference in the judgment—in the absence of evidence to the contrary.

Reference to a descriptive deed as being of record, or of

record in a named book and page, is not more effective as a guide to the deed, than is a reference in any other form, indicating the deed with equal certainty. The requirement is, merely, that the reference shall be certain enough to identify the descriptive deed, so that it may be found and verified as agreeing with the general descriptive allegations contained in the deed petition or judgment making the reference.

In the Brazoria petition, the descriptive paper referred to to identify the 177 acres in Harris county, part of the town tract of the town of Houston, about one mile from the Capital is a conveyance by David Russell, Sheriff, of Harris County, in pursuance of a Sheriff's sale to petitioner, that is, to MacGreal. (Trans. 17)

It was admitted that no other deed from Russell, sheriff, to McGreal, than the one already put in evidence by plaintiff, and now offered by defendants, appeared of record, in Harris county. (Trans. 20).

So, that the only possible question that could arise when this deed was offered by defendants, was whether or not it sufficiently corresponded with the general descriptive allegations in the Brazoria petition to admit of its introduction as the deed therein referred to. This question was not made and, obviously could not have been successfully made. The only objection made as has been already shown, was—not to the sufficiency of the reference to the petition to identify the descriptive deed—not to non-correspondence between the general descriptive allegations in the petition and the descriptive deed—not that the descriptive deed offered was not in truth, and in fact the very one referred to in the petition, but—that neither the Brazoria petition and judgment, nor the descriptive deed therein referred to, could be admitted in evidence, *because the judgment was void, in that neither it nor the petition to which it referred, described the land.*

Nass vs. Chadwick, 76 Tex. 572, was a suit to recover judgment upon three notes, and to foreclose vendor's lien upon a tract of land conveyed by plaintiff to defendant.

The land was described in the plaintiff's petition, thus:

A part of the Jesse Clary headright in Waller County, conveyed by W. S. Day, to W. T. Tollard, and by Tollard to Dillard, beginning, reciting boundaries. * * *

And containing an area of 273 4-10 acres, more or less, not to include a tract of about fifty acres sold out of said land, to . . .

This tract of land the part of two tracts conveyed to Chadwick, by M. M. Felder, as trustee, and described in his deed dated, April 20, 1870. (pp. 573-4).

By demurrer to the petition, and by objection to the introduction in evidence of the deed therein referred to, offered by plaintiff *for the purpose of identifying the land* on which the vendors' lien was sought to be foreclosed, the defendant made the point that the description was insufficient to authorize decree of foreclosure against the land. (p. 573.)

The demurrer was overruled, the deed admitted, and foreclosure decreed, describing the land as described in plaintiff's petition, without excepting the fifty acres of land. (p. 574).

On appeal, the defendant admitted that, *under proper pleading*, the plaintiff could have introduced evidence *"locating the fifty acres from the other part of the land embraced in the deed."*

But he contended, that as plaintiff sought to subject a *part* of a named tract of land to forced sale, he should have by pleadings and proof, *shown with certainty*, the land he sought to have subjected to sale, *"to avoid mistake by the sheriff* to the injury of defendant or any one else, and that the bidders at such forced sale, could be informed *by the sheriff's writ of the locality of the land that would pass by the sale, freed from the fifty acres reserved and excepted."* 573.)

It seems from the opinion, that the additional point was *first* made by defendant in the *Appellate* court, that the court below erred "in accepting the verdict as returned and on entering the judgment as recorded."

Affirming the judgment, the court said:

We can see no objection to the verdict, nor to the judgment, except that it includes in the foreclosure fifty acres of land that was excepted

from the conveyance to defendant. It is not shown how appellant can be prejudiced by this. He did not make the particular objection in the District Court. If he had called the attention of *that* court to the error in the judgment, it would doubtless have been corrected.

No error was committed in overruling defendant's demurrer, nor in permitting plaintiff to read in evidence, his deed, made to defendant. (p. 574.

Westmoreland & Co. vs. Carson, Sewell & Co., 76 Tex. 610, is to like effect.

There, Westmoreland & Co. being indebted to Carson, Sewell & Co., and also to Halff & Newbower, conveyed to them by an instrument in writing, their stock of goods, of which an inventory was to be taken, and the aggregate amount thereof credited on the indebtedness, *pro rata*. Whatever balance remained due, Westmoreland & Co. were to give their note for; secured by deed of trust on:—

About 968 acres of land of the F. K. Henderson headright, in Montgomery County, Texas, in the following proportions: Carson, Sewell & Co. to be secured by deed of Trust on 500 acres of said land, *beginning at the west boundary and extending east sufficiently far to embrace 500 acres, etc., etc.*, (p. 621).

Failing to execute note for balance and trust deed to secure it, Westmoreland & Co. were sued by Carson, Sewell & Co. on the original notes for the balance remaining unpaid thereon, after crediting the notes with Carson, Sewell & Co.'s *pro rata*, of the value of said stock of goods, and to establish said instrument as a mortgage, and foreclose it on the 500 acres of land.

The instrument was made part of Carson, Sewell & Co.'s petition. There was judgment for balance sued for, and of foreclosure of lien. Westmoreland & Co. appealed (pp. 621-2).

Affirming the judgment, the court said:—

Plaintiffs offered in evidence in support of their claim of a mortgage the instrument executed by defendants and attached to the petition to which defendants objected on the grounds "that the pretended equitable mortgage claimed by plaintiffs on land under said contract, *was void for want of description of the land*." The evidence was admitted, and the ruling is assigned as error. *We think the description of the land sufficient*, and that and the court did not err in so holding. Stein-

beck vs. Stone, 53 Tex. 382; Nulton vs. Robinson, 55 Tex. 404; Watson vs. Baker, 71 Tex. 747; Id., 526.

Plaintiffs offered in evidence a certified copy from the records of Montgomery county, of a deed to defendants for 90 acres of the F. K. Henderson survey, and offered to prove by the witness Chew, that *it was a copy of the only deed of record in Montgomery County, conveying to defendants any part of that survey, and that the land described in the copy of the deed was the same land described in plaintiff's petition;* to which defendant objected on the ground that the copy of the deed "was wholly irrelevant to the issues of the case, and that said evidence cannot be introduced to identify land referred to in written contract to give a mortgage thereon." The objection was overruled and appellants contend that the court erred in the ruling.

While we think the land against which the mortgage was claimed *was sufficiently described in the instrument itself to identify it*, we think the copy of the deed was not wholly irrelevant, and was admissible over the objection urged against it, *for the purpose of enabling the court to more absolutely define the boundaries of the 500 acres* (pp. 622-3).

Land Company vs. Chisholm, 71 Tex. 523, was an action to recover 640 acres of the Massie survey in Wichita county.

A deed was excluded when offered, upon the objection that *it contained no description of the land conveyed.*

The description objected to was thus:—

All the lands contained in patent number 303 volume 15 first class, to me, granted by the State of Texas, that has not been legally sold or disposed of for location. The above lands being situated and lying in the county of Wichita, and fully described in patent which accompanies this deed (p. 529).

Reversing the ruling, the court said:

That is certain which is susceptible of being made certain. The deed "conveyed all of the land granted by the described patent that had not been legally sold or disposed of for location. *By reference to the patent referred to in the deed a specific and accurate description of the land could doubtless be had.*" We think the description sufficient.

Wright vs. Lassiter, 71 Tex. 643-4, is to the same effect.

Citations to Texas authorities might be multiplied. But it is thought that the cases already discussed or cited, establish that description of land, in either deed or judgments are sufficient when they refer to other written instruments for description. That is, such descriptions are certain when they can be made certain by reference to such other instruments.

In other jurisdictions the same doctrine prevails.

A fully argued case is that of *DeSepulveda vs. Bough*, decided by the Supreme Court of California, Dec. 31, 1877, and reported in 10 Pacific Reporter, 223, and in 74 Cal., 468. It was an action to quiet title to land. Plaintiff had mortgaged two tracts of land, the description thereof in the mortgage being by metes and bounds; excepting that of certain parts which were described only by reference to certain recorded deeds, the book and page of record of each deed being specified in the mortgage. Mortgage was foreclosed and the land sold under the decree, in which the description of the land was the same as in the mortgage.

Defendants claimed title under the foreclosure, decree and sale.

Plaintiff claimed that defendants acquired no title, *because the description of the land in the decree was uncertain*; and being defeated below, appealed.

The court affirmed the judgment, although, in doing so it was necessary to overrule a former decision on the very point, (Crosby vs. Dowd, 71 Cal. 557).

Observing that the case is plainly within the rule laid down in *Crosby vs. Dowd*, the court proceeds:—

> A tract of 909 acres is described by metes and bounds, "excepting however, those portions of the above described tracts which are described in those certain conveyances executed by the party to the first part thereto, which are recorded respectively, in book 22 of deeds, p. 477; book 32 of deeds, p. 114; book 30 of deeds, p. 446; and book 48 of deeds, p. 466, records of Los Angeles county; to which deeds and the records thereof, reference is hereby made for further description, the remainder of the tract which is hereby conveyed containing about seven hundred and nineteen acres."
>
> This description is in the mortgage, complaint on foreclosure, the decree, sheriff's certificate and deed, and nowhere except by the above reference is there any description given of any of the excepted tracts. The *record of the foreclosure, therefore, contained no description from which it can be ascertained without such reference, no matter how familiar one might be with all the descriptive calls given as to any specific portion of the described land, whether or not it was conveyed by the mortgage deed, or whether the decree* is operative upon it; nor could he tell whether any portion of the metes and bounds of the 909

acre tract remain as any portion of the metes and bounds of the 700 acre tract.

Rejecting here a distinction attempted to be made by the appellee, between the case at bar and that of *Crosby vs. Doard*, the authority of which was being urged by the appellant, the court said the cases were not distinguishable, although, in the *Crosby* case the *only* description of the land was by reference to deeds in the recorder's office, whereas, in the case at bar, the mortgage, complaint, decree, certificate of sale, and sheriff's deed alike described a large tract by metes and bounds, excepting therefrom certain said portions; the opinion continues:

The judgment record, therefore, is not complete, *but other documents not in the record must be referred to ascertain what is the subject matter upon which the decree operates.*

But, I am of opinion that *Crosby vs. Doard*, ought not to be allowed to stand. I think I have examined all the cases cited in support of the decision by counsel, or by the court, and *I fail to find any authority for holding the judgment void upon a collateral attack.*

It may be admitted, that such a decree is *erroneous*, and will be corrected if the attention of the court is called to the defect by demurrer or proper motion, or by appeal.

But, for what reason is the judgment *void?* Certainly not for lack of jurisdiction, either as to the subject matter or the person. What *nullity*, known and recognized by established rules of law, is found in this judgement? If any, it must be because it is a proceeding to establish a lien, and there is no description of the thing to which the lien attaches. But by established rules of evidence, such a reference is not meaningless and does furnish a description of the thing. It is admitted that it is sufficient, and does amply describe the thing in the mortgage. But it is said that a *deed* is *evidentiary* and *may be helped out by other evidence*, while a *decree* is *final* and *determinative*. *The distinction is illusory.*

The trouble is said to be, that *the sheriff may not know with certainty what land he is to place the purchaser in possesion of.* The same uncertainty may, and generally will, exist where metes and bounds are given. The court says, assuming that the records can be found, the descriptive calls may be found indefinite, so as to render it impossible to locate them. *So too, any land marks called for may, for aught the court can ordinarily know, be impossible of location.* The call for

a pile of rocks on the bank of a creek may be very uncertain, while the reference to the deed may be definite and clear.

But, in a very large class of cases where the metes and bounds are given, *it still becomes necessary to refer to deeds and to records to locate the boundaries.*

What is the practical difference between the case at bar and one in which a description giving metes and bounds, describes the boundary as beginning at a stake at the north east corner of the land conveyed to Smith by Brown, by deed executed so and so, or a line running north to the southern part of Brown's land? Or what is the difference between this and a description, as lot 2, in section 2 etc., according to the United States land surveys? The lot could not be found without referring to the plat in the land office. The same is true of a description of a quarter section of land, according to the system of United States land surveys.

The plat must be referred to to find the *particular* quarter section. Then, land is often described by reference to town plats, sometimes where the plat has not become a public record, and the streets and lots only exist on paper. *The plat must be found to locate the land.* Farms are sold by reference to sub-division maps of large ranches.

Now, is this court to hold that *all judgments which describe the land by reference to these things are void?* Yet, in every one of these cases *the descriptions show on their face that some other document is referred to, and must be examined to make out the description.* * * *

The true rule would seem to be, that the judgment *is not void*; that the purchaser must, however, rely upon the description, and if it be found so defective, *when tested by rules of evidence ordinarily applied to the subject* that nothing can be found, he will fail; *otherwise, he will recover.*

In the case at bar, defendants were not allowed to "test" the description contained in the Brazoria record, although they stood ready to show, by the deed in that record referred to, and already in evidence for plaintiff, the metes and bounds of the 177 acres.

Stevenson vs. Flournoy, et. al., decided by the court of appeals of Kentucky, Feb. 15, 1890, reported in 13 S. W. Rep. 210, and in Ky. seems directly in line with out contention.

It was an action to enforce a judgment in a court, other than that in which the judgment was rendered, and the de-

fense was that the judgment was *void for uncertainty*, as to the beneficiaries of it.

The description claimed to be so uncertain as to avoid the judgment, was this:

It is now further adjudged, that the following defendants, to wit: The descendants of Samuel Flourney, deceased; the descendants of Elizabeth S. Henry, deceased; the descendants of Patsy Wells, deceased; the descendants of Robert Flourney, deceased; the descendants of David Flourney deceased, except Thomas Flourney, T. B. Flourney, Agnes Cross, and the descendants of Cassendra Ford; and the descendants of Francis Flourney, deceased, except Robert J. J. and Walker S. Flourney, recover as follows.

The court said:

It was held in *Shackleford vs. Fountain's Heirs*, 1 T. B. Mon. 252, that a judgment in favor of Fountain's heirs, *without naming them individually was not void for uncertainty*. The court said: "If the court below rendered such judgment, even if it is *erroneous*, we cannot say that is *void* for uncertainty." In the late case of *Parsons vs. Spencer*, 83 Ky., 305, such a judgment was held not to be void.

It is to be presumed in such a case, that *the record of the suit discloses their individual names.*

The same rule applies where a judgment is in favor of the des endants of a person without naming them individually

It is not *in terms*, but yet, *it is not void.*

As to the United States Circuit Court sitting in Texas, the judgment of the Brazoria court, is a *domestic* judgment, shielded by all the protective presumptions attaching to such judgments.

Owens, assignee, vs. Gotzian, 4 Dillon, 436; 16 Am. Law Reg. N. S., 181, applying the doctrine even as against *strangers* to the judgment

Landes vs. Brant, 10 How. 348.

Walker vs. Conkrite, 40 Fed. Rep. 130

White, Agent, vs. Crow, et al., 17 Fed. Rep. 98.

Being a domestic judgment, the rule applicable in the Circuit Court, is the same that it would be in a State court, were the effort there made to attack the judgment collaterally, viz:

In *collateral* proceedings, the *only* contingency in which the judgment of a domestic court of general jurisdiction *can be questioned*, is where *the record shows affirmatively, that its jurisdiction did not attach in the particular case.*

Murchison vs. White; 54 Tex. 82.
Wilkerson vs. Schoonmaker, 77 Tex. 617.
Williams vs. Haynes, 77 Tex. 284-6.
Treadway vs. Eastburn, 57 Tex. 209.
Letney vs. Marshall, 79 Tex. 515—All citing many authorities.

This court rules, that a true test of the jurisdiction of a court to render a judgment is the sufficiency, on demurrer, of the petition invoking that judgment.
United States vs. Arredonda, 6 Peters, 709; Freeman on Judgments, § 118.

In the Brazoria suit, the *parties* were before the court, the *subject matter* was within its jurisdiction, and the petition described the land by acreage, county and town tract wherein located, proximate distance from a point designated as "the Capitol," and by reference to a conveyance made to the petitioner, by a named person, who was sheriff of the county wherein the land was located, in pursuance of a purchase of the land at sheriff's sale. To this petition no demurrer could have been lawfully sustained. The allegations were certainly sufficient to admit evidence fixing the locality of the land with reference to "the Capital," and its specific boundaries, by the sheriff's deed.

Nass vs. Chadwick, 76 Tex. 572-4.
Westmoreland & Co. vs. Carson, Sewell & Co., 76 Tx. 621-3
Land Company vs. Chisholm, 71 Tex. 526.
Rogers vs. McLaren, 53 Tex. 426.
Steinbeck vs. Stone, 53 Tex. 386.
Knowles vs. Torbett, 53 Tex. 558-9.
Wright vs. Lassiter, 71 Tex. 643-4.
DeSepulveda vs. Baugh, 74 Cal. 468.
Tuley vs. The Tolleson, 74 Tex. 459

If upon this writ of error it is competent, as it is not believed to be—(The Stephen Morgan, 94 U. S., 599; Loudon vs. Taxing District 104 U. S., 771, 774; Destys, Fed. Proc., note to § 1012 R. S., citing Winslow vs. Wilcox, 4 Morr., Trans. 394) for the defendant in error to urge his "cross-assignment," the answer thereto is easy.

The assignment in effect, is, that the plaintiff below, should have been permitted to prove his replication to the plea of defendants below, setting up the Brazoria judgment; the allegations of the replication being, that the judgment was procured by fraud, that plaintiff had no notice of the suit, and was a resident of Pennsylvania, and not of Texas; and that he employed no one and authorized the employment of no one, to appear and answer for him in the suit.

And, that the Circuit court erred in sustaining exceptions to the replication, and in striking out the replication and the deposition of plaintiff taken to support it; because, although sitting in Texas, the Circuit court acted by the authority of a different sovereignty, and the question, being a common law question and not involving the construction of any law of Texas, the court had the same power, and it was as much its duty, to hear proof of the nullity of the Brazoria judgment, "as if it had been holding sessions in the State of New York, in a suit on said judgment."

(Trans. 25-6).

In brief, the contention embodied in the assignment is: That notwithstanding, the Brazoria judgment was a *domestic* judgment, *rendered upon recited appearance and pleading of all the parties and a formal hearing, and by a court having jurisdiction of the subject matter* it was liable, as would have been, under like circumstances, a *foreign* judgment, to collateral impeachment for want of notice and fraud.

Preliminarily, it is to be observed:

That the record here contains no pleading whatever, on the part of defendants, "setting up the judgment of the District court of Brazoria county." The only defensive pleading, on the merits, is contained in defendant's second

amended original answer, which makes no reference at all to the Brazoria judgment. (Trans. 5-6)

That there ever was a defensive *plea* based upon the fact of the Brazoria judgment, can only be *guessed* or *inferred*, from the cross-assignment, from plaintiffs replication (Trans. 3-4) to defendants first amended original answer (which is not in the record), from defendants second supplemental answer, specially excepting to plaintiff's replication (Trans. 4-5), and the court's judgment thereon (Trans. 7), and from plaintiff's bill of exceptions (Trans. 22-3).

Nor does the record contain the motion to suppress the plaintiff's deposition in support of his replication; nor the judgment of the court sustaining such motion; although, it may be *inferred* from plaintiff's bill of exceptions, that there was such a motion and such a judgment (Trans. 23).

This being the *status* of the record, it is not perceived that any question is before the court here upon the the plaintiff's cross-assignment. § 3, Rule VIII, S. C. Rules.

One, complaining here of the disposition made by the lower court, of a *pleading*, must have in his record here, not only the pleading disposed of below but the pleading against which it was directed. Plaintiff's replication was to "defendants' first amended original answer" (Trans. 3), and there is no such paper in the record.

Likewise, one complaining here of the disposition made by the lower court, of a *motion*, must have the motion in his record.

But if, notwithstanding the omission pointed out, the defendant in error, is to have the advantage here, of all that may be implied by or inferred from the record as it now stands before the court, then the claim of error must, certainly be limited by his *bill of exceptions* (Transcript 22-3), incorporated, substantially *supra*, in our statement of the case.

The strength of the bill of exceptions may be expressed thus:

The court erred in striking out, as a collateral attack on a domestic judgment, the replication of plaintiff to defendants answer pleading the Brazoria judgment in bar of plaintiff's action, and the deposition of plaintiff taken to sustain said replication that pleading being an effort to escape the bar of the judgment by showing that when the Brazoria suit was filed, "plaintiff was a citizen of and resident in the State of Pennsylvania, and that he was in the State of Texas, at the date of the institution of said suit, and that he had no knowledge of its pendency and and was never served with process therein, and that he never employed any attorney to appear for him in said suit." (Trans. 22).

The bill shows that the court's ruling was on the ground that the attack was collateral, according to the doctrine of the Texas courts, and that it, "sitting in Texas," must follow that doctrine (Trans. 23).

It does not appear that the plaintiff denied that the attack was collateral. Indeed, it goes without saying, that no such denial could be made, for the attack was neither by appeal from the judgment, nor by proceeding in the court where rendered to set it aside, and could not, therefore, be *direct*. Consequently, plaintiff's contention must be reduced to the proposition, that a Federal court in Texas may set aside and annul a former judgment of a Texas court (that is a *domestic* judgment) rendered, according to the record, upon due notice, and appearance of the parties, upon collateral attack.

It is not believed that the contention can stand.

That the judgment of the Brazoria court is, as to the Federal court in Texas, a domestic judgment, and not assailable collaterally, authorities have already been cited to show.

Owens, assignee vs. Gotzian, 4 Dillon 436; 16 Am. Law. Reg. N. S. 181.

Landes vs. Brant, 10 How. 348.

Walker vs. Conkrite, 40 Fed. Rep. 153.

White, Agent, vs Crow, et. al. 17 Fed. Rep. 98.

That such a judgment—reciting appearance of all parties, and contest between them by pleading—cannot be so impugned, has been, also, shown:

Letney vs. Marshall, 79 Tex. 515.
Murchison vs. White, 54 Tex. 82.
Wilkerson vs. Shoonmaker, 77 Tex. 617
Williams vs. Haynes, 77 Tex., 284-6.
Treadway vs. Eastburn, 57 Tex. 209.

Anticipating, as far as may be from claims made in the argument below, the line of cases upon which defendant in error probably relies, we remark that they will be found to be cases (1), of *direct* attack on *domestic* judgments, or (2), *collateral* attack on *foreign* judgments, or (3) on domestic judgments *in personam* where *the records affirmatively show* that the *non-resident* defendant has been cited only by *publication*, or other *constructive* process.

Thompson vs. Whitman, 18 Wall. 457, is the first case, so far as we are advised, in this court, even going so far as to hold that the judgment of the court *of another State than that wherein the Federal court sits* is liable to collateral attack in the latter court, upon a point of jurisdiction, against the recitations of the record in the court of such other State. But that case distinctly rules, that such attack cannot be made upon a *domestic* judgment.

On p. 468, it is said:

> The records of the *domestic* tribunals of England and some of the States, *it is true, are held to import absolute verity*, as well in relation to *jurisdictional* as to other facts, in all *collateral* proceedings. Public policy and the dignity of the courts, are supposed to require that *no averment shall be admitted to contradict the record*. But, as we have seen, that rule has no *extra territorial force*.

The court reviews prior cases, and none of them, save one, cited to support the decision, was the case of an assault,

collaterally, upon a *domestic* judgment. That one exception was Elliott vs. Piersal, 1 Peters 328, 340, where the point was, that the State court was absolutely without authority of law over the *subject matter*.

Indeed, the opinion in Thompson vs. Whitman, concedes, that the liability to collateral attack, *even of a judgment of a court of another State*, by disputing a recited jurisdictional fact, is thereby, for the first time adjudged. P. 408.

Hall vs. Lanning, 91 U. S. 160, like Thompson vs. Whitman, was a collateral attack on a judgment *of another State than that wherein the Federal court was sitting*, which recited that an attorney had appeared and put in an answer for the defendant in that suit. The court below refused to allow that recitation to be disputed. This was held error by the Supreme court, apparently because the judgment impeached was a *foreign* and not a *domestic* judgment. For, referring, on p. 167, to Thompson vs Whitman, *supra*, the court said:

> *Domestic* judgments, undoubtedly as was shown in Thompson vs. Whitman, stand in this respect, on a different footing from *foreign* judgments.
>
> *If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized*, they will not necessarily be set aside; but the defendant will sometimes be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. * * * * * *
>
> *In any other State*, however, *except that in which the judgment was rendered*, as decided by us in the cases before referred to, the facts could be shown, notwithstanding the recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person.

Knowles vs. Gaslight Co. 19 Wall 58, was a case like that of Hall vs. Lanning, and the court referred to Thompson vs. Whitman as decisive.

The judgment permitted to be assailed *was that of another State*.

against a citizen of *another* State,

Hart vs. Samsom, 110 U. S., 151, holds that a decree of a Texas court, for removal of cloud on title to land in that State, *who was cited by publication, only*, is no bar to an action of such citizen of another State, against the plaintiff in the State judgment, in the Federal court sitting in Texas; but the case, obviously, has no pertinency to the case at bar, because, among other things, pertinent also, but too numerous to be dwelt on here, the bases of that decision, are:

1. The *record of the State judgment showed affirmatively*, that Hart (the defendant in that judgment, and the plaintiff in the suit in the Federal court) was a *citizen of Louisiana* and was *served by publication*, and *default* taken against him and final judgment rendered thereon.

In the case at bar, the *record* of the State judgment, *affirmatively* shows that Newall *was a resident of Brazoria county, Texas*, and that he "came" and filed demurrer, general denial and not guilty, his answer being signed: J. A. Swett, Attorney for defendant, Stewart Newall." (Transcript 17, 19.)

The judgment on defendant's demurrer recites the presence of both parties by their attorneys, and the final judgment on the merits makes the same recitation. (Trans. 19-20.)

2. The plaintiff in the State case did not allege that Hart was *in possession of the land*, or that he was in privity with other defendants, or that he held a deed—the only allegation as to him, being that he set up some pretended claim or title. And the Supreme court ruled that the action in the Circuit court was not barred, because the judgment in the State court for possession of land did not effect Hart, since he was not alleged to have been in possession, and the judgment for removal of cloud did not afflict him, as, in that respect, it was limited to the cloud created by the deeds held by his co-defendants.

In the case at bar, Newall is shown by the record in the State court to have entered upon and taken possession of the land with force and arms, and to be still illegally holding possession thereof; and the prayer is, that he be ad-

judged to restore such possession, etc. (Trans. 17-8)

The judgment was, that plaintiff have and recover from Newall, the land in controversy, and that Newall be forever barred from having or asserting any claim thereto, (Trans. 20).

The conclusion in Hart vs. Sansom, is that since the State judgment against Hart, was *upon the record* (as already explained) merely *in personam*, it was not supported by *publication* on him—*a non-resident*.

The court only holds what the Texas courts hold: That *where the record shows affirmatively, service on a non-resident, by publication merely*, or by other constructive service, in a *personal* action, the non-resident is not affected by the judgment, and it can be collaterally attacked anywhere

(Scott vs. Streepy 73, Tex. 547.

Martin vs. Cobb, 77, Tex. 546).

St. Clair vs. Cox, 106 U. S. 350, is like in character and doctrine to Hart vs. Sansom.

Pana vs. Bowlers, 107 Id. 545, is to the same effect.

Pennoyer vs. Neff, 95 Id. 714, is of the same class.

That, however, was as to the force of a judgment *of another State*.

Shelton vs. Tifflin, 6 How. 163, was the case of a *direct*, not collateral, attack, and has no application.

Galpen vs. Page, 18 Wall. 350, was the case of a personal action against *a minor non-resident*, who *was shown by the record of the State Court, and by the finding of that court*, not to have been served *in any way* with process.

The court held the judgment rendered against the defendant open to collateral impugnment.

It could not have held otherwise.

Windsor vs. McVeigh, 93 U. S. 274. In this case, the

judgment collaterally impeached, was that of a Federal court confiscating property during the late war.

Although, notice was given the defendant to appear, when he appeared and answered, his answer was stricken out, his right to appear denied by the court, and his property confiscated. All this was affirmatively shown by the record assailed.

This court ruled that the confiscation judgment was, for these reasons—"a mockery." And so it was.

One other suggestion, adverse to the contention of defendant in error, arises upon the allegations of his replication, that he had knowledge of the Brazoria suit and judgment as early as 1875, and the failure to allege that he ever took any proceeding to review or vacate the judgment, or that he has, or ever had, a meritorious defense to said suit. (Trans. 4).

The point was made in the demurrer (defendant's second supplemental answer) to the replication, thus: * *

Fourth: It appears therefrom that the plaintiff has had full knowledge of the said suit and judgment since the year 1875, and it does not appear that he has ever taken any proceeding to review, appeal from, vacate, or qualify said judgment and his right to do so, now is barred by limitation, and lost by laches.

Fifth: It appears therefrom, that plaintiff does not claim to have, or to have had at any time, a meritorious defense to the said suit, in which said judgment was rendered. (Tran. 4-5)

By the replication, the Brazoria judgment is assailed upon allegations, showing it to be *voidable merely*—not void.

All the alleged facts are conceded by the pleader to have been known to him as early as 1875, and it is not claimed that he ever took steps to undo the alleged wrong, or that he is excused by any fact for his failure to do so.

Had he sought relief as late as the date of the institution of this suit (July 5, 1890), against the Brazoria judgment and those claiming under it, he would have been hopelessly barred, without respect to the term of limitation found to apply to the form of action he might have chosen

He could not have appealed; for the revised Civil Stat. of Texas provide:

ART. 1387. An appeal may, in cases where an appeal is allowed, be taken *during the term of the court at which the final judgment in the cause is rendered*, by the appellants giving notice of appeal in open court, which shall be noted on the docket and entered of record, and by his filing with the clerk an appeal bond, or affidavit in lieu thereof, as hereinafter provided, *within twenty days after the expiration of the term.*

He could not have availed of writ of error, for said Statutes provide:

ART. 1389. The writ of error may, in cases where the same is allowed, be sued out at any time within two years after the final judgment was rendered, and not thereafter, except in the case of infants, married women, and persons of unsound mind, who shall have two years after their respective disabilities within which to sue out such writ.

There is in Texas no special limitation prescribed to actions to set aside judgments, but the law prescribes a term of limitation, applicable to all personal actions other than those specifically designated:

ART. 3207. Every action other than for the recovery of real-estate, for which no limitation is otherwise prescribed, shall be brought *within four years next after the right to bring the same shall have accrued, and not afterward.*

He would have been barred under this article, had his effort been by an original action to set aside the judgment.

In the only case wherein a bill of review of a judgment is provided for by the statute, the bill must be filed within two years after the rendition of the judgment:

ART. 1373. In cases in which judgment has been rendered on service of process by publication where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed *within two years after the rendition of such judgment.*

Even if it be conceded that Newall would have been per-

mitted to seek relief against the Brazoria judgment by a proceeding of similar character to that recognized by this article, the bar therein prescribed would have applied to his action, by analogy.

Weaver vs. Shaw, 5 Tex. 289.

Chambers vs. Hodges, 23 Tex. 110.

Kleinecke vs. Woodward, 42 Tex. 315.

Murchison vs. White, 54 Tex. 85-6.

Berkley & Gay Furniture Co. vs. Sherman Hotel Co., S. C. Tex., reported 16 S. W. Rep. 807.

No proceeding in equity—such as a suit to cancel the judgment and remove the cloud thereby cast upon his title—could have availed him; because conceding to him the longest limit, he could not have maintained a suit brought more than *ten* years after the judgment was rendered, or, at most, after he knew of it (in 1875), in face of the defense of stale demand and laches.

Haskins vs. Wallet, 63 Tex. 220; 68 Id. 420-3.

Berkey & Gay Furniture Co. vs. Sherman Hotel Co., reported in 16 S. W. R. 807—probably to appear in 80 Tex.

Timmen vs. Mebane, 10 Tex. 247-8-256.

The replication is fatally defective, in that it fails to show that Newall has, or ever had, a defense to the Brazoria suit.

Schleicher vs. Markwood, 61 Tex. 102-3, and cases cited.

Morris vs. Edward, 62 Tex. 205, 208.

Sharp vs. Schmidt & Zeigler, 62 Tex., 265 and cases cited.

1 Black on Judgments; §325, p. (401) citing Russell vs. Pottawattanne Co., 20 Iowa, 258, which cites Hefferman vs. Burt, 7 Id., 320.

F. CHARLES HUME,

Counsel for Plaintiffs in Error.

155-532

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SUPREME COURT OF THE UNITED STATES.

No. 715.

October Term, 1892.

ELIZA COOPER, ET, ALS.,
Plaintiffs in Error,

against

STEWART NEWELL,
Defendant in Error.

Brief for Defendant in Error

JOHN IRELAND,
Counsel for Defendant in Error.

Seguin Enterprise Print, Seguin, Texas.

SUPREME COURT OF THE UNITED STATES.

ELIZA COOPER, ET. ALS., PLAINTIFFS IN ERROR,
against
STEWART NEWELL, DEFENDANT IN ERROR.

This is a writ of error from the Circuit Court for the Eastern District of Texas at Galveston, to the Supreme Court of the United States.

The complainant, a citizen of New York, brought this suit in trespass to try title, alleging that he was the owner of 177 acres of land situated in Harris county, Texas, within the Eastern District, worth over $5,000 (five thousand dollars).

He alleged that he was seized in fee, and that the defendants were setting up ownership to said land, and that they were in possession and had evicted plaintiff therefrom.

Defendants answered the general issue of not guilty, and set up a judgment, obtained in the District (State) Court of Brazoria county, and alleged that the matters in this suit were adjudicated and fully determined in said Brazoria suit. Both parties claimed under one Peter Magreel, see pages 4 and 5 printed record.

Plaintiff amended and replied to the matters set up in said answer, page 3 printed record.

In this replication, plaintiff set up that if such judgment was obtained in the Brazoria court, that it was fraudulent and void.

That plaintiff was never served with process, or appeared either in person or by attorney, and in fact had no knowledge either direct or constructive of the pendency of such suit, and that at the time of the filing of said suit, and all the time up to final judgment therein, he was a non-resident of the state of Texas, residing in and a citizen of the state of Pennsylvania.

Plaintiff also alleged that said Brazoria judgment was void on its face, because the property sought to be adjudicated was not described—page 16.

The trial court sustained exceptions to the replication of plaintiff as to notice in the Brazoria suit, and struck out plaintiff's deposition to prove the facts alleged—see plaintiff's bill of exceptions page 22.

The court excluded the Brazoria judgment because of its nullity, and there was a verdict and judgment for the plaintiff.

Motion for new trial overruled and defendants brought this writ of error—page 23.

Plaintiff also filed cross errors—page 25.

There is but one question necessary to be considered in determining this case, and that is, was it error to exclude the Brazoria judgment.

It is believed that no well considered case can be found in any country or court, where a judgment has been sustained for real property, that did not contain a sufficient description to enable the sheriff or marshal to put the party in possession, or when there was not on file in the record of the case some paper, or description, that might be resorted to by the court for a description.

Authorities.

Cooley on Taxation, page 284.

Philadelphia vs. Miller, 49, Penn. state.

R. 440. A description in a judgement which refers to another paper is void on its face.

People vs. Cone, 48 California, R. 427.

A description, which could be made good by reference to other papers, as between individuals, would not be good in an involuntary transfer.

Cooley on Taxation, pages 283, 4, 5, and 6, and note.

Hill vs. Thorreny, 6 Gray, R. 531.

Parol evidence cannot aid description.

Cooley on Taxation, 356.

The record must show that the subject matter

was adjudicated.

Michigan vs. Eldridge.

6 Bissel 370, Eastman vs. Cooper.

15 Pick R. 276, Gilbert vs. Thompson.

6 Cush. R. 348.

Hooker vs. Hubbard, 102 Mass. R. 425.

The record of a judgment is the only evidence of its contents.

Stepen's Evidence, Art. 39; 1st Greenleaf's Evidence, sec. 538; Ennis vs. Smith, 14 How. R. 400.

The petition in the Brazoria case describes this tract of land, the last one in the petition, as follows:

"In Harris county, containing 177 acres, being a part of the town tract of the town of Houston about one mile from the capitol and being the same tract bought at sheriff's sale and conveyed by David Russell, sheriff of Harris county, to petitioner." R. page 17.

Now it will be observed that this Russell deed, referred to, is never made an exhibit or attached to the pleadings or even filed among the papers.

The description in the judgment in Brazoria follows that in the petition.

The writ of possession must follow the judgment. Who then, or in what manner shall the description in the Russell or sheriff's deed to McGreel be obtained?

It cannot be embodied in the judgment, suit, or any proceedings.

Left to itself. as it is and was, the judgment describes nothing.

It purports to be part of a large tract (?) one mile from the capitol. What capitol?

177 acres. Which 177 acres?

It is insisted by appellant that the deed from the sheriff to Magreel must have been on file when the judgment was rendered. There was no suggestion of a diminution of the record, and the FACTS are proof clear that it was not there.

If the sheriff's deed to Magreel had been on file when the judgment was rendered, is it not clear that the description in the judgment would have embodied the description in the sheriff's deed?—but the reverse is true. The description in the judgment follows that in the petition and nothing more.

The record must show that the thing was adjudicated.

Michigan vs. Eldred, 6 Bissel 370; Eastman vs. Cooper, 15 Pick. R. 276; Aiken vs. Peck, 22 vt. page 260.

Hooker vs. Hubbard, 102 Mass. R. 425.

There is a class of cases, such as liens, mortgages, &c., (contract cases) where the debtor will not be heard to question the sufficiency of the description in foreclosures, because they made the description; but in involuntary conveyances, such as trespass to try title or forced sale, nothing can be taken by intendment or description supplied.

Cooley on Taxation, 356.

Wilson vs. Johnson, 10.

South E. Reporter, 105, Stillman vs. Palais, 23d Ill. 408, Meriam vs. Doree, 36; N. W. Reporter, 382; Nebraska case.

Extrinsic evidence cannot be (in forced or involuntary transfer) resorted to and unless the levy, which must follow the judgment, is sufficient in description, the sale is void.

Herman on executions.

Forbes vs. Hall, 51 Me. 568; Stewart vs. Cook, 37 Ill. 283; Dorsey vs. Dorsey, 28 Md. 388.

Norwood vs. Cobb, 15 Texas 500.

Winsor vs. McVeigh, 3 Otto 274.

Warren Co. vs. Actria, 2 Paine 503.

Parker vs. Spencer, 61 Texas, bottom of page 161.

Wharton's evidence, sec. 797.

Herman on Estopel, sec. 91.

The Brazoria judgment is void on its face. Herman vs. Erhart, 33 Texas, 60; Norris vs. Hunt, 51 Texas, 614; Murray vs. Laird, 27 Texas, 89.

The description must be sufficient to enable the sheriff to place the successful party in possession, and a relaxation of this rule has never existed in the United States.

Edward vs. Jackson, 8 Cowen, 427; United States vs. Cliamoyren, 11 Otto, 822.

Byrch vs. United States, 15 pet. 275.

Presley vs. Testard, 29 Texas, 202.

M. R. Boyd, 4 Sawyer 362.

Woodford vs. McKenna, 23 Texas, 36.
Presley vs. Testard, 29 Texas, 201.

This is but a part of a large tract.

Being a part of a large tract the judgment is void.

McDonald vs. Red River Bank, 74 Texas, 539.
Knowles vs. Torbet, 53 Texas, 557.
Mitchell vs. Ireland, 54 Texas, 301.

Such judgments stand on a different footing from mortgages and they must be complete in themselves.

Nelson vs. Broadbach, 44 Mo. 596.
See Allday vs. Whittaker, for judgment held insufficient, 66 Texas, 609.

In judicial transmission of title the description must be good.

Rorer on judicial sales, 792.

Nothing beyond the record can be resorted to.
2 Cald. Tenn. R. 298.
Freeman on judgments, 54.

The judgment must show on its face the precise land sued for.

Herman on Estopel, 168.
Develin on deeds, sec. 1405 and 1406.

When a judgment is given in evidence its nature and effect can only be determined by the record.
2 How. 43.

Altman vs. Cummins, 9 How. 479.

The court could only look to its papers on file for the land in rendering judgment, and could not send to Harris county for the sheriff's deed.

Clarkson vs. Tom, 18 Texas 68.

Lloyd vs. Bank, 35 Texas 7.

Reference to a paper not on file is no description, and no judgment could be lawfully rendered.

Brown vs. Horless, 22 Texas, 646.

There was no land described and no proof could be offered.

Powell vs. Davis, 19 Texas, 383.

The judgment if void of description is not sufficient.

Black on judgment, sec. 117.

Reference to a paper not on file does not make it a part of the record and can never be resorted to, to aid the judgment.

Black, sec. 723 and note.

Freeman, sec. 71; the right to add to or amend is confined to the record.

In this case there was no mistake or omission. The judgment accorded with the petition, and after the lapse of more than forty years it is proposed to go to Harris county and hunt up the sheriff's deed. Freeman, sec. 72. What is the "roll" or "record?" Freeman, 79.

The clerk could not have issued a writ. Boykin vs. The State, 3 Yerger, Tenn. R. 426. Parol evidence not admissible; 3 Doree, S. C. R. 423.

What has been done in a court must be shown by record. Putnam vs. New Albany, 4 Bissell 395, same book, Spark vs. Volger, 288, Wilcox vs. Emerson, 10 R. J. Rep. 270.

You cannot aid a levy by parol, Rorer 577.

The offer was not to prove that the Russell deed was before the court when the judgment was rendered, but to bolster up the judgment by offering the Russell deed.

Packett Co. vs. Seikers, 5 Wall., page 593.

The appellee files cross errors. Should this court reverse this judgment, on appellant's motion, then these cross errors are insisted upon, and the court is respectfully requested to review the rulings of the court below in its rulings in sustaining exceptions to appellee's plea and evidence.

It is elementary and lies at the foundation of all rights and is essential to give a meaning to the term "court:" that no man's rights, in person or property, shall be prejudiced without a chance to be heard.

I know that from certain considerations of public policy it has become a rule that when a person is a resident of a certain country or government, that he being supposed to be cognizant of the doings of the courts of that country must proceed promptly to correct any errors of her courts.

And for some purposes a judgment rendered by a Federal court sitting in a state, may be called a "domestic" judgment, but this leaves the main question here untouched. The record in the Brazoria judgment shows that the court had been in session nearly three weeks, when in fact a defendant could not be called unless he had been served 5 days before the term began. A day before final adjournment a petition was filed against a man who resided in the city of Philadelphia in the state of Pennsylvania.

An answer was filed by an attorney found by the plaintiff, and on the same day a demurrer is overruled, and on the NEXT day a trial. R. pages 16, 17, 19. No wonder the Harris county deed from Russell was not procured. There was no time.

Now Newell offered to prove that he had no knowledge or information of that Brazoria proceeding. That he employed no attorney, and no one was authorized to appear for him and that he was not in Texas, but in Philadelphia, Pennsylvania, and living there at the time. No railways, no telegraphs, no means of communicating, and we are told that he, Newell, is to be bound by this corrupt and fraudulent proceeding.

The proposition is shocking to all sense of justice and would be a stigma upon the country and courts that should give sanction to it.

The doctrine here contended for, to wit: the right of Newell to allege and prove any where and at any time such judgment might be invoked against him, because it is only there that he can be charged

with notice of it, that he was not in fact a party to it in any sense; had no notice, either constructive or actual, neither in person or by an authorized attorney, is clearly set out in the opinion in Neff vs. Penoyr; Gray vs. Larrimore, 2 Abbott, c. c. R. 542. This case is very full.

Hill vs. Muxthol, 21 Wallace, 453.

Adams vs. Saratoga Railway Co., 10.

New York R. 6 Selden 332.

Black on judgment sec. 901, 903.

Laurence vs. Jones, 32 Ill. 304.

4 Peters 470.

Sheldan vs. Tiffin, 6 How. 186.

Knowles vs. Gaslight Co., 19 Wall. 58.

Arnot vs. Webb, Peters c. c. R. 155.

This was an appearance by attorney.

Hall vs. Lansing, 1 Otto 160.

Penobscott Railroad Co. vs. Wicks, Me. Virgin R. 1.

But it is said, that because the Circuit Court of the United States, from which this appeal is taken, was holding session in Texas where the Brazoria judgment was obtained, we were attacking a domestic judgment which could not be done.

We have shown that no court in no state or country could sanction so monstrous a proceeding as the Brazoria judgment, nor would Texas sanction it AGAINST A NON-RESIDENT.

But the case from Dillon c. c. R. cited by appellants cannot be held to overrule the general rule adopted in the circuit courts.

In the case of Galpin vs. Page, 3 Sawyer, Judge Fields uses this language:

"The Circuit Court of the United States for California has the same authority to examine into the jurisdiction of the state courts of California, when its judgments are produced, as the Circuit Courts of the United States for the district of New York has when the same (California) judgment is produced before that tribunal."

This Galpin vs Page is a very thoroughly considered case, and is in all respects like the one under review.

To the same effect is the case of Swift vs Myer, 37 Federal Report 37.

It is said that the Brazoria suit is a suit in Rem. If that was a suit in Rem. it would be difficult to find one that was not.

Galpin vs. Page also settles this.

Lapse of time can never give sanctity to such a judgment.

Shafer vs. Gates, 2 B. Monroe, Ky., 456.

Paul vs. Willis, 69 Texas, 261.

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Counsel for Defendant in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

ELIZA COOK AND OTHERS, Plaintiffs in Error,
vs.
STEWART NEWELL.
No. 129.

Additional Brief for Defendant in Error.

A few words only, if any, are needed in addition to the discussion in the brief of Governor Ireland for defendant on the 3d assignment of errors (Rec., 24) as to the sufficiency of what is called the *Brazoria Judgment* rendered in 1850, &c. There is in that judgment no description of the land sued for, only as "*a certain 177 acres mentioned in the petition*," and that petition contains no description, but only a general reference. It scarcely needs authority to show that judgment is utterly valueless, for uncertainty.

The rule is simple and unambiguous that "the property, which is the subject of a judgment or decree, must be described with sufficient certainty to leave its identity free from doubt" (*Freem. Judg., sec. 50, c.*, 3 edn.); or "a judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the

special *thing* or the amount of money recovered. (*Spencer v. Simmons, 16 Ala., 828.*)"

Or, as possibly more pertinent to this case, as Judge Williams, of the Supreme Court of Arkansas, very aptly stated it, "neither should the court, after overruling the demurrer, have proceeded to order distribution of the estate among the complainants without *specifically setting out the property to be distributed, and not, as seems to have been done, left the plaintiffs to go out and find what has been awarded them as best they could.*" *Freel v. Elrod*

And see 12 Am. and Eng. Ency. (Tit. Judgments), p. 75, note 3; *Ib.*, 148 b.) Measured by this rule, this judgment was not admissible in evidence.

And if the rule could be stretched, so as to permit the judgment to refer to another document or paper to make it certain, the defect in it is not cured, as it does refer to the petition in the case, which is vague, indefinite, and uncertain, and is no more sufficient than the judgment itself.

Being void then, it is void now and for all time; it neither binds nor bars anybody, and no limitation or other right can be based upon it. (*Freem. Sup., Sec. 117.*)

Counsel for plaintiffs presents here to this court a question which is not raised in the court below, and it is now for the first time in the progress of the case suggested; and that is, that there is no sufficient averment of the citizenship of the defendant below to give the trial court jurisdiction of this cause. It is true that the petition does not state with directness that defendants below were citizens of the State of Texas, but if their citizenship can be sufficiently shown by the Record that will be sufficient. In other words, it is not necessary, in order to give the jurisdiction, that citizenship should absolutely be averred in the petition or declaration. To use the language of the Chief Justice in *Railway Co. v. Ramsey, 22 Wall., 328,* "if, therefore, with these papers in the Record the jurisdiction

would appear, the judgment ought not to have been arrested," we say, if the papers and proceedings in this Record show the citizenship, that would be quite sufficient. This case (*22 Wall., sup.*) has been affirmed and followed by this court in *Briges* v. *Sperry, 95 U. S., 401*; *Robertson* v. *Cease, 97 ib., 646*; and *Grace* v. *American, etc., 109 ib., 278.*

Now to the Record: they are averred in the petition to be *residents* (Rec., 2); *residence* is *prima facie* evidence of citizenship. (*Pequignot* v. *City, etc., 16 Fed. R., 211*, and cases cited.) Then, the averment is distinct that they entered into possession of the land in controversy, ejected Newell therefrom, and are in possession of the land, and withhold it from him. Then they are served with process where they are *residents*, and they come and appear by attorney and plead to the merits of the case. Ordinarily right here the question would end, and they would not be permitted to raise the point of jurisdiction. Here is an express waiver of the question, and a virtual admission of citizenship. And upon this state of the case, to say no more, it would appear that there was jurisdiction, ample and complete. (*Taylor et al.* v. *Cook et al., 2 McLean, 516.*) And it is entirely too late, in view of these facts, to insist upon the question here.

Gassis v. *Ballon, 6 Pet., 761*;
Express Co. v. *Kountze Bros., 8 Wall., 342*;
Bradstreet v. *Thomas, 12 Pet., 59.*

But we go further, and we find in pleading (Rec., 4–6) they state they are in possession of, cultivating and using this land in controversy, for more than ten years past, and that they claim under proceedings, in reference to this land title, through parties who were citizens during many long years before, in fact, claiming as heirs of Thomas B. Westrop, an old citizen of that district, their homestead. (Rec., 16, 17). And it further appears, that they are there in person in the Eastern District of Texas.

procuring the necessary papers to prosecute the writ of error to this court, and giving bond, and qualifying to the same; all done on the 28th day of March, 1891, before the United States commissioner of that district. If a jury were impanelled to try the question of citizenship of these people, upon the necessary papers in this Record, they could not fail to find that they were citizens; and certainly this court can not hesitate to so find, since no doubt was thrown upon this by any pleading or any step proposed or taken in the court below. This is even a stronger case than that of *Bradstreet, 12 Pet., sup.*, because in that case the question was attempted to be raised during the trial, but it was held the party had waited too long even in that court; but in the present case, a long and protracted trial has been had, in which there are almost direct admissions of citizenship, and here, after all these things, for the first time the objection is made.

It is respectfully submitted, from what is fairly and properly before the court, the objection is not tenable.

A. H. GARLAND,
For Defendant.